Supreme Court, U.S.
FILED

(1)

95-847 NOV 30 1995

No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS GAMBINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID A. BARRETT
Counsel of Record
DUKER & BARRETT, L.L.P.
1585 Broadway
New York, New York 10036
(212) 969-5600

MICHAEL ROSEN
17 Battery Place
New York, New York 10007

GERALD L. SHARGEL
1585 Broadway
New York, New York 10036

JUDD BURSTEIN
99 Park Avenue
New York, New York 10016

GRAHAM HUGHES
40 Washington Square South
New York, New York 10012

November 30, 1995

QUESTIONS PRESENTED

1. Whether the mandatory dismissal provisions of the Speedy Trial Act allow a conviction to be affirmed on the ground that, because the defendant would likely have been reindicted, the failure to dismiss was "harmless error"?

2. Whether this Court should resolve a conflict among the circuit courts of appeals on the issue whether a district court may allow effectively unlimited tolling of time limits under the Speedy Trial Act by deferring resolution of a pretrial evidentiary motion until during or after trial?

LIST OF PARTIES

The defendants named in the original indictment were John Gotti, Salvatore Gravano, Frank LoCascio and petitioner Thomas Gambino. Thomas Gambino's trial was severed from that of the other defendants. Thereafter, a superseding indictment was returned that named petitioner, Giuseppe Gambino and Philip Loscalzo as defendants. Loscalzo died before trial, and petitioner was tried with Giuseppe Gambino. Giuseppe Gambino was acquitted.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

INTRODUCTION 3

STATEMENT OF THE CASE 6

A. The Charges Against Petitioner 6

B. The Speedy Trial Act Violation 6

C. The Court of Appeals' Finding of a Speedy Trial Act Violation 8

D. The Court of Appeals' "Harmless Error" Rationale 12

REASONS FOR GRANTING THE WRIT 14

1. The "Harmless Error" Doctrine Cannot Be Used to Circumvent the Government's Violation of Time Limits Imposed by the Speedy Trial Act 14

A. Established Principles of Statutory Interpretation Compel Reading the Speedy Trial Act to Preclude "Harmless Error" Analysis 14

B. This Court's Interpretation of the Speedy Trial Act Precludes "Harmless Error" Analysis 18

C. This Court's Recent Analyses of the Harmless Error Doctrine Preclude Its Application to the Speedy Trial Act 22

II. This Appeal Presents a Conflict Among the Circuits on the Important Issue Whether Deferring a Ruling on a Pretrial Evidentiary Motion Indefinitely Tolls the Time Limits Under the Speedy Trial Act 25

CONCLUSION 28

TABLE OF AUTHORITIES

Cases: PAGE

Ardestani v. Immigration & Naturalization Service, 502 U.S. 129 (1991) 15

Arizona v. Fulminante, 499 U.S. 279 (1991) . . 22, 23, 24

Brecht v. Abrahamson, ___U.S.___, 113 S. Ct. 1710 (1993) 22, 23

Brock v. Pierce County, 476 U.S. 253 (1986) 17

Connecticut National Bank v. Germain, 503 U.S. 249 (1992) 14

Costello v. United States, 350 U.S. 359 (1956) 16

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 15

Good Samaritan Hospital v. Shalala, ___ U.S. ___, 113 S. Ct. 2151 (1993) 14

Henderson v. United States, 476 U.S. 321 (1986) . 10, 25

Kastigar v. United States, 406 U.S. 441 (1972) . . . 7, 9

Negonsott v. Samuels, ___U.S.___, 113 S. Ct. 1119 (1993) 15

Pioneer Investment Services Co. v. Brunswick Associates, ___ U.S. ___, 113 S. Ct. 1489 (1993) 14

Ratzlaf v. United States, ___U.S.___, 114 S. Ct. 655 (1994) 21

Reves v. Ernst & Young, ___ U.S. ___, 113 S. Ct. 1163 (1993) 14-15

United States v. Alvarez-Sanchez, ___ U.S. ___, 114 S. Ct. 1599 (1994) 14

United States v. Beard, 41 F.3d 1486 (4th Cir. 1995) 11, 25, 26

United States v. Castle, 906 F.2d 134 (5th Cir. 1990) 15

United States v. Clymer, 25 F.3d 824 (9th Cir. 1994) 11, 25, 26-27

United States v. Engstrom, 7 F.3d 1423 (9th Cir. 1993) 16

United States v. Gertner, 65 F.3d 963 (1st Cir. 1995) 24

United States v. James Daniel Good Real Property, ___ U.S.___, 114 S. Ct. 492 (1993) 17

United States v. Jones, 887 F.2d 492 (4th Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990) 15

United States v. Koory, 20 F.3d 844
(8th Cir. 1994) 15-16

United States v. Kottmyer, 961 F.2d 569
(6th Cir. 1992) 15

United States v. Lattany, 982 F.2d 866
(3d Cir. 1992) 15

United States v. McAfee, 780 F.2d 143
(1st Cir. 1984) 15

United States v. Miranda, 835 F.2d 830
(11th Cir. 1988) 16

United States v. Montalvo-Murillo,
495 U.S. 711 (1990) 17

United States v. Regilio, 669 F.2d 1169
(7th Cir. 1981), *cert. denied*, 457
U.S. 1133 (1982) 15

United States v. Riley, 991 F.2d 120
(4th Cir.), *cert. denied*, ____ U.S.
____, 114 S. Ct. 392 (1993) 11, 25, 26

United States v. Ruggiero, 846 F.2d 117
(2d Cir. 1988) 5

United States v. Scalf, 760 F.2d 1057
(10th Cir. 1985) 16

United States v. Taylor, 487 U.S. 326
(1988) 4, 18, 19
20, 21, 22

United States v. Tribote, 297 F.2d 598 (2d Cir. 1961) 5

United States v. Tunnessen, 763 F.2d 74 (2d Cir. 1985) 15

United States v. Williams, 504 U.S. 36 (1992) 16

Statutes and Rules:

18 U.S.C. § 1952 . . . . . 6, 7

18 U.S.C. § 1962 . . . . . 4, 7

18 U.S.C. § 3161 . . . . . 2, 3, 6, 8, 11, 15, 26

18 U.S.C. § 3162 . . . . . 3, 15, 20, 21

26 U.S.C. § 7609(f) 24

28 U.S.C. § 1254(l) 2

Fed. R. Crim. P. 12(b) 11

No.

In The

Supreme Court of the United States

October Term, 1995

THOMAS GAMBINO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Thomas Gambino respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, affirming his conviction for violating the RICO statute even though the court of appeals concluded that petitioner's rights under the Speedy Trial Act (the "Act") had been violated and that the district court therefore had erred in not dismissing petitioner's indictment.

OPINIONS BELOW

The court of appeals' opinion affirming petitioner's conviction is reported at 59 F.3d 353 (2d Cir. 1995), and appears at 1a.[1] The court of appeals' order denying the petition for rehearing appears at 109a. The opinion of the district court denying petitioner's motion to dismiss the indictment is reported at 818 F. Supp. 541 (E.D.N.Y. 1993), and appears at 82a. The district court's opinion denying petitioner's motion for a new trial is reported at 835 F. Supp. 74 (E.D.N.Y. 1993), and appears at 32a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on July 3, 1995 (1a). The court of appeals denied petitioner's timely-filed petition for rehearing on September 8, 1995 (109a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The statutory provisions involved in this appeal are 18 U.S.C. § 3161 and 3162, which are set out in full at 115a-125a. The subparts of those statutes most pertinent to this appeal are as follows:

18 U.S.C. § 3161:

> (h) The following periods of delay shall be excluded . . . in computing the time within which the trial . . . must commence:

---

[1] References to the separately-bound Appendix to this Petition are in the form "1a".

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

. . . .

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

18 U.S.C. § 3162(a):

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter [18 U.S.C. §§ 3161 *et seq.*] and on the administration of justice.

INTRODUCTION

This is a case in which the court of appeals agreed with petitioner that his rights under the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, had been violated. The court of

appeals further agreed with petitioner that the district court should have granted his motion to dismiss the indictment. Nonetheless, the court of appeals affirmed petitioner's conviction for violating the RICO statute, 18 U.S.C. § 1962, on the unprecedented basis that the district court's error in not dismissing the indictment had been "harmless":

> Given dismissal without prejudice, the government would have been free to seek to have Gambino reindicted; and even the appellant now concedes that reindictment would have been inevitable. As the government had already managed in fact to indict Gambino a total of three times on virtually identical charges, . . . we may comfortably assume that a fourth indictment would have been readily forthcoming. Thus, Gambino's position today would be no better even if the district court had dismissed the superseding indictment.
>
> We conclude, accordingly, that the error was harmless, and that Gambino's conviction must stand (19a).

Accordingly, this case squarely presents an issue of substantial national importance to the application of the Speedy Trial Act: Whether "harmless error" analysis can *ever* be applied to affirm a conviction notwithstanding a finding that there has been a violation of the Act. As we detail below, the court of appeals' application of harmless error analysis to the Act is unprecedented and insupportable. It flies in the face of the express language of the Act as interpreted by this Court in *United States v. Taylor*, 487 U.S. 326 (1988), and by every other appellate decision we have located.

Indeed, if the decision below is not reversed, the mandatory dismissal provisions of the Act — and with them the entire prophylactic purpose of the Act — will be effectively rendered a dead letter. For if the likelihood of reindictment becomes the test (as it surely would under the decision below), then the Government will almost always be able to claim that reindictment is likely and hence, that failure to dismiss (and logically, even violations of the Act) are harmless error.

In addition, granting review in this case will allow the Court to resolve a sharp conflict among the circuits on the important question whether the time limits of the Speedy Trial Act are tolled — and hence effectively circumvented — by the simple expedient of a district court's deferring its ruling on a pretrial motion (such as a motion to suppress) until during or after the trial. Although the court below decided this issue in petitioner's favor in finding that the Act had been violated here, the Government will undoubtedly argue that the contrary view, espoused by the Fourth and Eleventh Circuits, provides an alternative ground for affirmance, *i.e.*, that there was no Speedy Trial violation.

The petitioner's name may be notorious in the minds of many. It is just such cases, however, that test the fair and impartial administration of justice. "Once we embark upon shortcuts by creating a category of the 'obviously guilty' whose rights are denied, we run the risk that the circle of the unprotected will grow." *United States v. Tribote*, 297 F.2d 598, 604 (2d Cir. 1961) (Kaufman, J.). Infamous defendants "are no less entitled to the protection . . . afforded by" provisions like the Speedy Trial Act. *See United States v. Ruggiero*, 846 F.2d 117, 129 (2d Cir. 1988) (Lumbard, J., dissenting). Indeed, the Act was crafted by Congress not only to protect defendants, but to serve the public interest as

well. Yet a "harmless error" rule born of notoriety now threatens the integrity of that statutory structure.

STATEMENT OF THE CASE

A. The Charges Against Petitioner

Petitioner was originally indicted in 1990, together with John Gotti, Frank Locascio and Salvatore Gravano, on RICO charges of conducting a pattern of racketeering activity through an enterprise known as the "Gambino Crime Family". Although the indictment included multiple predicate acts of murder, bribery, obstruction of justice and tax fraud, the predicate acts charged against petitioner were limited to allegations that he supervised an illegal gambling business in Connecticut and related extortionate credit and (under a superseding indictment) Travel Act violations.

Petitioner was ultimately convicted of a substantive RICO violation and conspiracy. He was sentenced to 5 years' imprisonment followed by 5 years' supervised release and fined $100,000 (111a-113a).

B. The Speedy Trial Act Violation

The chronology that gives rise to the Speedy Trial Act claim in this case was as follows:

December 12, 1990: The original indictment was filed against petitioner, John Gotti, Frank Locascio and Salvatore Gravano.[2] On the same day, there was an order of exclud-

---

[2] The District Court for the Eastern District of New York (Glasser, D.J.) had jurisdiction under 18 U.S.C. § 1962.

able delay based upon the district court's determination that this was a complex case. *See* 18 U.S.C. §3161(h)(8)(B)(ii).

June 26, 1991: Petitioner moved to dismiss the charges against him, asserting that a portion of the government's proof was derived from his immunized grand jury testimony. The district court deferred ruling on petitioner's request for an evidentiary hearing pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972), until after completion of trial.

October 23, 1991: On the Government's motion, petitioner was severed from the Gotti indictment so that petitioner could be tried on unrelated state charges brought under the New York criminal antitrust statute.

April 2, 1992: The trial of Gotti and Locascio ended with guilty verdicts; Gravano had earlier pleaded guilty and become a government witness. By this time, petitioner's New York state trial had also concluded.

April 3 through August 3, 1992: There was complete silence from the Government.

August 4, 1992: A superseding indictment charging violations of 18 U.S.C. § 1962(c) and (d) was unsealed and filed against petitioner and two new defendants, Giuseppe Gambino and Philip Loscalzo. The charges against petitioner were the same as those alleged against him in the original Gotti indictment, except that violations of the Travel Act were added as RICO predicate acts and as a substantive count.[3]

---

[3] The substantive violation of the Travel Act, 18 U.S.C. § 1952, contained in Count Three of the superseding indictment, was dismissed prior to trial on venue grounds. *Gambino*, 818 F. Supp. at 550 (102a). The Government did not appeal.

August 14, 1992: Petitioner was arraigned on the superseding indictment.

August 21, 1992: At a pre-trial conference, trial was scheduled for February 1, 1993. An order of excludable delay based on §3161(h)(8)(B)(ii), the complex case exclusion, was entered. The exclusion covered only the period from August 21, 1992 to February 1, 1993. Nothing was said about the period preceding August 21, 1992.

December 7, 1992: Petitioner filed a timely motion seeking, *inter alia*, dismissal of the superseding indictment on the ground that the Speedy Trial Act had been violated by the 140-day gap between the end of the John Gotti trial on April 2, 1992 and the August 21, 1992 order of exclusion.

April 15, 1993: The district court denied petitioner's motion under the Speedy Trial Act. *Gambino*, 818 F. Supp. at 550 (83a-102a).

April 19 through May 11, 1993: In a jury trial, petitioner was found guilty. Guiseppe Gambino was acquitted of all charges; Loscalzo had died before trial.

July 16, 1993: Following a hearing, the district court denied petitioner's *Kastigar* motion.

C. The Court of Appeals' Finding of a Speedy Trial Act Violation

Noting that "[t]he government has advanced several reasons for its delay in bringing Gambino to trial . . . [and] [t]he district court added another" (6a), the court of appeals undertook an extensive analysis in concluding that the Act had been violated by the 140-day delay beginning with the conclusion of the John Gotti trial on April 2, 1992.

First, the court of appeals rejected the government's claim that the characterization of the case as "complex" served to exclude time under the Act after the John Gotti trial had been completed:

> Generally a trial court should set at least a tentative trial date in granting a complex case exclusion . . . . Thus, we think the December 1990 order of excludable delay is best understood as having been made in contemplation of the commencement of trial on the original indictment. Despite the fact that his own case had been severed, Gambino's speedy trial clock therefore ceased to be tolled when that trial took place . . . . (8a)

Second, the court of appeals addressed the fact that, after filing of the superseding indictment in August 1992, counsel for petitioner sought a delay in the trial, informing the district court that such delay would not raise any speedy trial problems. The court of appeals correctly recognized, however, that the Act had already been violated by August 1992. Hence, while acknowledging that deliberate conduct by a defendant could result in waiver of the protections of the Act, the court concluded that there had been no such conduct in this case (11a-16a).

Third, the court of appeals found that, because the addition of new codefendants in the superseding indictment occurred *after* the Act had been violated, it did not authorize the prior delay:

> Under the circumstances of this case the belated joinder of new co-defendants took place too late to reset the appellant's speedy trial clock. Appellant's case was joined with those

> of Loscalzo and Giuseppe Gambino in the superseding indictment only *after* the challenged delay. We are unable to identify any cases holding that joinder effectively resets a defendant's speedy trial clock to zero after that defendant's speedy trial right has already been violated by delay. Such a result, moreover, would open the door to prosecutorial abuse, permitting 70-day extensions to be unilaterally obtained by means of sequentially indicting co-defendants. (17a)

Fourth, and finally, rejecting the government's reading of *Henderson v. United States*, 476 U.S. 321 (1986), the court of appeals agreed with the Ninth Circuit, and rejected the position of the Fourth and Eleventh Circuits, on the issue whether the Speedy Trial clock had been tolled by virtue of the district court's deferral until after trial of the hearing that petitioner had sought long before trial on his *Kastigar* motion (*see* pp. 7-8 above):

> In the case at hand we are faced with the not uncommon circumstance of a trial judge postponing an evidentiary hearing until the conclusion of the case in chief. In such circumstance, the pendency of the motion no longer consumes the court's time and attention. The motion has in effect been tabled. Yet the government would have us rule that the fact of a pending motion cancels the time requirements of the Speedy Trial Act. Obviously were we to so hold, perpetual postponements would become routine in every case where a defendant seeks an evidentiary hearing.

The question is whether the Supreme Court's ruling in *Henderson* compels this result. Two circuits have recently disagreed as to the answer. In *United States v. Riley*, 991 F.2d 120 (4th Cir.), *cert. denied*, ____ U.S. ____ 114 S. Ct. 392 (1993), the Fourth Circuit ruled that when a hearing on a pretrial suppression motion is deferred until after trial, all of the time from the filing of the motion until its disposition is properly excluded under § 3161(h)(1)(F). It said that a motion so deferred does not "los[e] its character as a 'pretrial' motion for purposes of § 3161." 991 F.2d at 123. *Riley* also noted that Fed.R.Crim.P. 12(b) "does not define the term 'pretrial' by whether a motion is in fact decided before trial." *Id.* (emphasis in original).[4] In contrast, *United States v. Clymer*, 25 F.3d 824 (9th Cir. 1994), construing the same subdivision of § 3161(h) stressed the word "resulting" rather than the word "pretrial." The Ninth Circuit thought it was error to exclude all delay that coincides with the motion's pendency because delay under the express terms of the Speedy Trial Act may be excluded "only when it in some way results from the pendency of the motion." *Id.* at 830.

We agree with the Ninth Circuit that Congress envisioned that the speedy trial clock be tolled when the expenditure of judicial resources to decide the motion would interfere

---

[4] In *United States v. Beard*, 41 F.3d 1486 (11th Cir. 1995), the Eleventh Circuit followed *Riley*.

> with the case expeditiously proceeding to trial, and not tolled when the postponement of a pretrial motion until after trial does not effect a trial court's ability to proceed. We believe therefore Gambino's pretrial motion did not toll his speedy trial clock from the time that the hearing on the motion was postponed until after his trial. The government may not therefore rely on the pendency of this motion to excuse its delay. *Were we to agree with the Fourth Circuit*, the pretrial motion would have tolled the speedy trial clock and that would of course completely excuse the government's delay.

(10a-11a) (emphasis and footnote added).

D. The Court of Appeals' "Harmless Error" Rationale

Although the court of appeals flatly concluded that, for the foregoing reasons, "[t]he district court erred . . . in not finding that the Speedy Trial Act was violated" (17a), it nevertheless affirmed petitioner's conviction. The sole basis for affirmance was the conclusion that the district court's error in refusing to dismiss the indictment had been "harmless":

> We recognize that the district court said that had it dismissed the indictment, it would have done so without prejudice. In so ruling, the court correctly applied the statutory factors governing prejudice . . . .
>
> Given dismissal without prejudice, the government would have been free to seek to have Gambino reindicted; and even the appellant now concedes that reindictment would

have been inevitable. As the government had already managed in fact to indict Gambino a total of three times on virtually identical charges, *see* 818 F. Supp. at 542-43, we may comfortably assume that a fourth indictment would have been readily forthcoming. Thus, Gambino's position today would be no better even if the district court had dismissed the superseding indictment.

We conclude, accordingly, that the error was harmless, and that Gambino's conviction must stand. Nonetheless, we hasten to add that our holding is not a signal that affirmance of a district court's failure to dismiss an indictment on harmless error grounds, so long as a "without prejudice" analysis is undertaken as mandated by the Act, will routinely follow. On the contrary, since we review the question of prejudice *de novo*, nondismissal in the event of a violation will always risk nullifying an entire trial. Reversible error, in a case as complex and hard-fought as this one, would have been costly indeed (18a-19a).

REASONS FOR GRANTING THE WRIT

I. THE "HARMLESS ERROR" DOCTRINE CANNOT BE USED TO CIRCUMVENT THE GOVERNMENT'S VIOLATION OF TIME LIMITS IMPOSED BY THE SPEEDY TRIAL ACT.

A. Established Principles of Statutory Interpretation Compel Reading the Speedy Trial Act to Preclude "Harmless Error" Analysis.

In recent years, this Court has emphatically insisted that the judiciary should take the Legislative branch at its word:

> [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut National Bank v. Germain, 503 U.S. 249, 253-54 (1992) (*quoting Rubin v. United States*, 449 U.S. 424, 430 (1981)) (other citations omitted). *Accord, United States v. Alvarez-Sanchez*, ___ U.S. ___, 114 S. Ct. 1599, 1603 (1994); *Good Samaritan Hospital v. Shalala*, ___ U.S. ___, 113 S. Ct. 2151, 2157 (1993); *Pioneer Investment Services Co. v. Brunswick Associates*, ___ U.S. ___, 113 S. Ct. 1489, 1495 (1993); *Reves v. Ernst & Young*, ___ U.S. ___, 113 S.

Ct. 1163, 1169 (1993); *Negonsott v. Samuels*, ___U.S.___, 113 S. Ct. 1119, 1122-23 (1993); *Estate of Cowart v. Nicklos Drilling Co., 505* U.S. 469, 476 (1992); *Ardestani v. Immigration & Naturalization Service*, 502 U.S. 129, 135-36 (1991).

Here, the language of 18 U.S.C. § 3162(a)(2) could not be more clear: "If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the . . . indictment *shall be dismissed on* motion of the defendant" (emphasis added). As the Fourth Circuit held in *United States v. Jones*, 887 F.2d 492, 494 (4th Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990): "The decision to dismiss for noncompliance with the Speedy Trial Act with or without prejudice is within the discretion of the trial court . . . . That discretion, however, is not unlimited, *the Act mandating dismissal of an indictment*. . . ." (emphasis added).

Every other Circuit Court, including the Second Circuit, has agreed that the Act provides absolutely no room for discretion as to whether the indictment should be dismissed. *See United States v. McAfee*, 780 F.2d 143, 146 (1st Cir. 1984) ("Dismissal of the indictment is . . . *mandated"); United States v. Tunnessen*, 763 F.2d 74, 79 (2d Cir. 1985) ("the indictment *must be dismissed"); United States v. Lattany*, 982 F.2d 866, 871 (3d Cir. 1992) ("the indictment . . . *must be dismissed"); United States v. Castle*, 906 F.2d 134, 138 (5th Cir. 1990) ("Castle . . . was tried in violation of the Speedy Trial Act, *necessitating the reversal* of his conviction"); *United States v. Kottmyer*, 961 F.2d 569, 572 (6th Cir. 1992); ("district court was *required to dismiss the* indictment"); *United States v. Regilio*, 669 F.2d 1169, 1171 (7th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982) ("the indictment *must be dismissed"); United States v. Koory*,

20 F.3d 844, 846 (8th Cir. 1994) *("dismissal is mandatory"); United States v. Engstrom,* 7 F.3d 1423, 1426 (9th Cir. 1993) (the "sanction for a speedy trial violation *is dismissal"); United States v. Scalf,* 760 F.2d 1057, 1060 (10th Cir. 1985) (dismissal of the indictment is "*mandatory"); United States v. Miranda,* 835 F.2d 830, 834 (11th Cir. 1988) ("The Speedy Trial Act has been violated and *we must dismiss* this case") (emphasis added in all quotations).

Notwithstanding this uniform reading of the statute's plain language, the court of appeals in this case engrafted an unprecedented harmless error exception onto the Act's mandatory dismissal provision. In doing so, the court effectively read the "dismissal without prejudice" provision out of the Act. If, as the court concluded, the operative inquiry is whether the defendant would have been reindicted, reversals for failing to dismiss without prejudice will only be available, as a practical matter, when the statute of limitations has run. This result is inevitable because, given that a prosecutor is not obligated to present either admissible evidence, *Costello v. United States,* 350 U.S. 359 (1956), or exculpatory evidence, *United States v. Williams,* 504 U.S. 36 (1992), to the grand jury, reindictment after a dismissal without prejudice is virtually certain in all cases.

When, then, could a failure to dismiss without prejudice ever (absent running of the statute of limitations) *not* be a harmless error? Under the court of appeals' analysis, the answer to this question is never. The refusal to grant a dismissal without prejudice will *always* be harmless error under the opinion below because reindictment will always be inevitable. This being so, adoption of a harmless error rule in this circumstance will gut the "dismissal without prejudice" remedy provided by the Act. Surely, Congress did not intend to include a meaningless remedy in a carefully drafted

statute.[5]

Moreover, the goal of deterring future violations of the Act, so fundamental to the statutory scheme, is fatally undermined by the court of appeals' decision. The decision will inevitably encourage the government both to ignore the Act and to engage in brinkmanship before the district court. Prior to the court's decision, one of the strongest incentives for the government to adhere to the Act (and to take reasonable positions in response to motions to dismiss under the Act) was the possibility that it might have to reindict and retry a case if it were reversed on appeal. Now, however, this salutary threat has been removed, since the government will know that reversal is highly unlikely when a conviction is obtained after an erroneous district court refusal to dismiss an indictment without prejudice. The inevitable result will be increased violations of the Act, together with hardened and more unreasonable government responses when defendants seek relief from those violations.

Dismissal of the indictment in this case is the result mandated by Congress, as well as by the past decisions of this Court. Congress *could* have granted district courts discretion not to dismiss an indictment where reindictment appears likely. Yet, it chose not to do so. By its decision

---

[5] Also relevant here are cases such as *Brock v. Pierce County*, 476 U.S. 253 (1986), and *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), which stand for the proposition that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States v. James Daniel Good Real Property*, ___ U.S.___, 114 S. Ct. 492, 506 (1993). As a matter of common sense, the converse of this proposition should also apply: Where a statute unequivocally specifies a remedy, courts should not create exceptions to that sanction.

here, the court of appeals has in turn chosen to reverse that Congressional determination. This is a choice that it did not have the power to make.

B. This Court's Interpretation of the Speedy Trial Act Precludes "Harmless Error" Analysis.

Beyond the plain language of the Act, this Court in *United States v. Taylor*, 487 U.S. 326 (1988), interpreted the Act in a manner that precludes the "harmless error" approach adopted by the court of appeals. The decision below is inconsistent with *Taylor's* controlling interpretation of the Act for at least three reasons.

First, in *Taylor*, this Court reversed dismissal of an indictment with prejudice on the ground that the district court had not given due deference to the option of dismissing without prejudice. In so holding, the Court made it crystal clear that the issue of prejudice to the defendant — the same fundamental inquiry that must be undertaken in any harmless error analysis — is an issue that Congress directed the courts to address *only* in determining whether to dismiss with or without prejudice:

> There apparently were those in Congress who thought courts should consider prejudice to the defendant before barring reprosecution. *See* 120 Cong. Rec. 41778 (1974) (remarks of Representative Dennis); *id.*, at 41795 (remarks of Representative Conyers). After suggesting that he might offer an amendment to add that factor to the statute's list of considerations for the court, Representative Dennis agreed to establish through "legislative history" the relevance of prejudice to the defendant. *Ibid.* Representative Cohen, the author of the

> compromise amendment, agreed that prejudice to the defendant was relevant, *id.*, at 41794-41795, but opposed adding that factor to § 3162(a)(2) for fear that district courts would treat a lack of prejudice to a defendant as dispositive: "[W]e [should] not consider it as a separate independent ground for the prosecution and open up to the Justice Department and the prosecutor to say we have not met the time limit and we did not take advantage of all the other time exemptions, but there is no prejudice to the defendant. I do not think that would be a sufficient basis in the consideration of the other factors to determine if justice would be done." 120 Cong. Rec., at 41795. Representative Cohen's amendment was thereafter adopted without further modification. *Although the discussion in the House is inconclusive as to the weight to be given to the presence or absence of prejudice to the defendant, there is little doubt that Congress intended this factor to be relevant for a district court's consideration [in deciding to dismiss with or without prejudice].*

487 U.S. at 333-34 (collecting cases) (emphasis added; footnote omitted).

Taylor thus stands unequivocally for the proposition that harm to the defendant is a matter to be taken into account in connection with the type of dismissal authorized by the Act, and not with the question whether or not there should be a dismissal.

Second, dissenting in *Taylor,* Justice Stevens argued that the district court's decision to dismiss with prejudice

should be upheld because, *inter alia,* "[a]s a district judge, I would know that a dismissal without prejudice would be a rather meaningless sanction unless, of course, the statutes of limitations had run, in which event the choice between dismissal with and without prejudice would itself be meaningless." 487 U.S. at 350.

The Taylor majority explicitly rejected this reasoning. Most significantly, recognizing that "[d]ismissal without prejudice *is not a toothless sanction,*" this Court went on to explain:

> [I]t forces the Government to obtain a new indictment if it decides to reprosecute, and it exposes the prosecution to dismissal on statute of limitations grounds. Given the burdens borne by the prosecution and the effect of delay on the Government's ability to meet those burdens, substantial delay well may make reprosecution, even if permitted, unlikely. If the greater deterrent effect of barring reprosecution could alone support a decision to dismiss with prejudice, the consideration of the other factors identified in § 3162(a)(2) would be superfluous, and all violations would warrant barring reprosecution.

487 U.S. at 342 (emphasis added; footnote omitted).

Thus, the unmistakable import of *Taylor* is that dismissal without prejudice has a salutary purpose — deterring future violations — even if reindictment may be a foregone conclusion. Yet, in deciding this case solely on the basis of whether the defendant was prejudiced — *i.e.*, harmed — by the failure to dismiss without prejudice, the court of appeals ignored the fundamental structure underlying the dismissal remedies of the Act as interpreted in *Taylor.* In so doing, the court of appeals effectively transformed the remedy

of dismissal without prejudice into the very "toothless sanction" that this Court has rejected. *See Taylor,* 487 U.S. at 342.[6]

Third, § 3162(a)(2) (cited by the court in the preceding passage in *Taylor)* states that "[i]n determining whether to dismiss the case with or without prejudice, the court *shall* consider, among others, each of the following factors . . ." (emphasis added). In *Taylor,* this Court reversed the district court because, *inter alia,* it had failed to consider some of the factors that the Act mandates must be considered in deciding whether to dismiss with or without prejudice. Yet the word requiring consideration of these factors — *"shall"* — is the same word that Congress used to govern dismissal of an indictment earlier in the same paragraph of the Act: "the indictment . . . *shall* be dismissed . . . ." (emphasis added). There is no basis for concluding that Congress intended to give the word "shall" two different meanings in the same paragraph. *See Ratzlaf v. United States,* ___U.S.___, 114 S. Ct. 655, 660 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it

---

[6]Indeed, in the course of its harmless error discussion, the court of appeals explicitly acknowledged the foregoing considerations, stating:

> The government violates the Act at its peril. Forcing the government to reindict a defendant after a Speedy Trial Act violation may seem a "purposeless formalism," 818 F. Supp. at 548 [96a], but *it is the sanction Congress saw fit to impose, and it was therefore the district court's duty to impose it.* (18a) (emphasis added).

Inexplicably, however, the court of appeals went on to ignore the very principle it had just stated by finding the error to be harmless.

appears"). Indeed, this Court recognized as much in *Taylor* when it stated:

> Ordinarily, a trial court is endowed with great discretion to make decisions concerning trial schedules and to respond to abuse and delay where appropriate. The Speedy Trial Act, however, confines the exercise of that discretion more narrowly, *mandating dismissal of the indictment upon violation of precise time limits, and specifying criteria to consider in deciding whether to bar reprosecution.*

487 U.S. at 343-44 (emphasis added).

C. This Court's Recent Analyses of the Harmless Error Doctrine Preclude Its Application to the Speedy Trial Act.

The decision below is also inconsistent with this Court's decisions in *Arizona v. Fulminante,* 499 U.S. 279 (1991), and *Brecht v. Abrahamson,* ___U.S.___, 113 S. Ct. 1710 (1993), which analyzed and applied the "harmless error" doctrine. In both *Fulminante* and *Brecht*, the Court distinguished between "trial error," which is subject to harmless error review, and "structural defects," which are subject to a *per se* rule of relief.

As defined by the Court in *Fulminante,* "trial error" is —

> error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.

499 U.S. at 307-08; *see Brecht,* 113 S. Ct. at 1717.

In contrast, "structural defects" are those deficiencies "in the constitution of the trial mechanism" —

> which defy analysis by "harmless error" standards. The entire conduct of the trial from beginning to end is obviously affected . . . . [A] . . . structural defect affect[s] the framework within which the trial proceeds, rather than [being] simply an error in the trial itself.

Fulminante, 499 U.S. at 309-10; *see also Brecht,* 113 S. Ct. at 1717 ("structural defects" require "automatic reversal of the conviction because they infect the entire trial process").

Under these definitions, recently articulated by this Court, violations of the Speedy Trial Act cannot be deemed "trial error." Rather, failure to dismiss results in a defendant being tried on an indictment that is invalid under the Act. Accordingly, the error in refusing to dismiss is a "structural defect[ ] in the trial mechanism . . . affecting the framework within which the trial proceeds." It fatally "infect[s] the entire trial process." The court of appeals thus erred in applying harmless error analysis to a "structural defect" which, by definition, "def[ies such] analysis." *Fulminante, supra; Brecht, supra.*

Put another way, the court of appeals misconstrued the nature of the district court's error, which may not be fairly characterized as a simple failure to recognize that the Act had been violated. Rather, the error was in not dismissing the indictment as required by the Act. This is so because once violation of the Act is established, a district court *must* dismiss. It thus becomes clear that harmless error analysis should not be employed because the relief that the defendant

was erroneously denied is an end in itself: termination of the proceedings against him. It is the nature of the error — a direct failure to terminate the proceedings — that renders the error "structural" in nature.

As another court of appeals recently recognized in an analogous context (involving an Internal Revenue Service subpoena issued under 26 U.S.C. § 7609(f)) the government's failure to follow procedures mandated by statute should not be deemed harmless error because those "procedures represent a basic legislative judgment about the importance of taxpayers' privacy and other rights — *and courts must respect that judgment.*" *United States v. Gertner,* 65 F.3d 963, 971-72 (1st Cir. 1995) (emphasis added).

In contrast, "trial errors" require an additional layer of analysis. For example, when a trial court errs in refusing to exclude evidence, determining the remedy requires an assessment of all other evidence as well. An appellate court must decide, first, whether there was an error, and second, whether a sanction (reversal) should be imposed. A finding of error by the trial court therefore requires a secondary inquiry into the likelihood that the defendant is guilty absent the challenged evidence. *See Fulminante,* 499 U.S. 309. This is the essence of "trial error." Where the Act is violated, though, there is no need for a secondary analysis on the issue of sanction because that issue has been resolved by the Act itself, which does not direct or allow the court to consider the defendant's probable guilt or innocence.

II. THIS APPEAL PRESENTS A CONFLICT AMONG THE CIRCUITS ON THE IMPORTANT ISSUE WHETHER DEFERRING A RULING ON A PRETRIAL EVIDENTIARY MOTION INDEFINITELY TOLLS THE TIME LIMITS UNDER THE SPEEDY TRIAL ACT.

In affirming petitioner's conviction based upon a harmless error determination, the court of appeals rejected the government's argument that the Act had not been violated because resolution of petitioner's *Kastigar* motion (*see* pp. 7-8 above) had been deferred until after trial. In so ruling, the court of appeals sided with the Ninth Circuit's decision on this issue in *United States v. Clymer,* 25 F.3d 824 (9th Cir. 1994), and explicitly declined to follow the contrary conclusion reached by the Fourth Circuit in *United States v. Riley*, 991 F.2d 120 (4th Cir.), *cert. denied,* ___U.S.___, 114 S. Ct. 392 (1993). The Fourth Circuit's view was also later adopted by the Eleventh Circuit in *United States v. Beard,* 41 F.3d 1486 (4th Cir. 1995).

Although the court of appeals agreed with petitioner on this issue, granting this Petition would enable the Court to resolve this conflict, which has significant implications for the fair and consistent administration of justice in the federal courts. If review is granted in this case, the Government will undoubtedly renew its argument and seek affirmance of petitioner's conviction on the ground that there was no violation of the Act. In light of the fact that four circuits have now addressed the issue in detail and split into two sharply divided camps, review is clearly warranted. This appeal provides an appropriate vehicle for this Court to resolve the conflict.

Moreover, the issue is an important one. In *Henderson v. United States,* 476 U.S. 321 (1986), this Court held that, in computing periods of delay under the Speedy

Trial Act, courts must exclude all time consumed by pretrial motions — from filing through ultimate decision — regardless of whether the amount of time taken by the trial court in that process is reasonable. Following *Henderson,* the circuit courts have split on the question whether the mere pendency of a pretrial motion, without a decision thereon, and irrespective of what other proceedings may have occurred, serves to toll the Speedy Trial Act clock indefinitely.

In the first appellate decision to address the issue, *United States v. Riley*, 991 F.2d 120 (4th Cir.), *cert. denied*, ___U.S.___, 114 S.Ct. 392 (1993), the trial court had deferred resolution of a pretrial motion to suppress evidence until such time as the government decided to offer the evidence. Thereafter, a mistrial was granted prior to resolution of the motion. Relying upon *Henderson,* the Fourth Circuit held that the time between the mistrial and the start of the new trial was excludable because the motion to suppress was still pending. The Fourth Circuit stated: "[T]here is no requirement that this time be justified as reasonable." *Riley,* 991 F.2d at 124. In *United States v. Beard,* 41 F.3d at 1489, the Eleventh Circuit chose to follow *Riley.*

On the other hand, in *United States v. Clymer,* 25 F.3d 824 (9th Cir. 1994), the Ninth Circuit reached the opposite conclusion. It rejected the government's claim that the deferral of a motion to dismiss the indictment based upon outrageous government conduct tolled the Speedy Trial clock until the conclusion of trial:

> According to its plain terms, § 3161(h)(1)(F) applies only when the *delay in bringing the case to trial is the result of the pendency of a pretrial motion.* That provision does not refer to delay "coinciding with" or "accompanying"

> the pendency of a motion. It refers only to delay "*resulting from* any pretrial motion." By phrasing the exclusion in this way, Congress clearly expressed its intent to toll the Speedy Trial Act clock when the need to decide the motion would interfere with the case's proceeding to trial. Equally clearly, Congress did not intend to allow district courts to render the time limits in the Act a nullity by setting motions for hearing at the time of trial or after trial and thereby making all time prior to trial excludable. In short, under the plain language of the statute, delay is excludable only when it in some way *results from the pendency of the motion.*

25 F.3d at 830 (emphasis added). The court below considered the same issue at length, carefully reviewing the Fourth and Ninth Circuit decisions. *See* pp. 10-12 above. It expressly adopted the Ninth Circuit's view and rejected that of the Fourth Circuit.

With the decision in this case, the split amongst the circuit courts has deepened and crystallized as to whether *Henderson* permits the strictures of the Act to be avoided in perpetuity simply by deferring resolution of a pretrial motion until during or after trial. This split is enough in itself to justify granting this Petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

November 30, 1995

Respectfully submitted,

DAVID A. BARRETT
Counsel of Record
DUKER & BARRETT, L.L.P.
1585 Broadway
New York, New York 10036
(212) 969-5600

MICHAEL ROSEN
17 Battery Place
New York, New York 10007

JUDD BURSTEIN
99 Park Avenue
New York, New York 10016

GERALD L. SHARGEL
1585 Broadway
New York, New York 10036

GRAHAM HUGHES
40 Washington Square South
New York, New York 10012

Of Counsel

COUNSEL PRESS
11 EAST 36TH STREET, NEW YORK, NEW YORK 10016
(212) 685-9800; (516) 222-1021; (914) 682-0992; (908) 494-3366; (716) 852-9800; (315) 423-9800

(135462)

(2)
Supreme Court, U.S.
FILED
NOV 30 1995
OFFICE OF THE CLERK

No. 95-847

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS GAMBINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID A. BARRETT
Counsel of Record
DUKER & BARRETT, L.L.P.
1585 Broadway
New York, New York 10036
(212) 969-5600

MICHAEL ROSEN
17 Battery Place
New York, New York 10007

GERALD L. SHARGEL
1585 Broadway
New York, New York 10036

JUDD BURSTEIN
99 Park Avenue
New York, New York 10016

GRAHAM HUGHES
40 Washington Square South
New York, New York 10012

November 30, 1995

TABLE OF CONTENTS

PAGE

Appendix A
Opinion of United States Court of Appeals for the Second Circuit in *United States v. Thomas Gambino* (July 3, 1995) 1a

Appendix B
Memorandum and Order of United States District Court, Eastern District of New York (Glasser, D.J.), denying petitioner's motion for a new trial (October 26, 1993). 32a

Appendix C
Memorandum and Order of United States District Court, Eastern District of New York (Glasser, D.J.), on certain pre-trial motions, including motion to dismiss under Speedy Trial Act (April 15, 1993) 82a

Appendix D
Order of United States Court of Appeals for the Second Circuit denying petitioner's motion for rehearing (September 8, 1995) 109a

Appendix E
Judgment Including Sentence of United States District Court, Eastern District of New York (October 29, 1993) 111a

Appendix F
Statutory Provisions Involved in this Appeal
18 U.S.C. § 3161 . . . . . 115a
18 U.S.C. § 3162 . . . . . 123a

Appendix A

Court of Appeals Decision

59 F.3d 353 (2d Cir. 1995)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 29 -- AUGUST TERM, 1994

(Argued August 31, 1994 Decided July 3, 1995)

Docket No. 93-1754

UNITED STATES OF AMERICA
Appellee,

v.

THOMAS GAMBINO,
Defendant-Appellant.

Before:

NEWMAN, *Chief Judge*, KEARSE and CARDAMONE, *Circuit Judges.*

Thomas Gambino appeals from a judgment of conviction for a RICO violation and RICO conspiracy under 18 U.S.C. § 1962 (c), (d), entered October 29, 1993, in the United States District Court for the Eastern District of New York (Glasser, J.). Appellant's claims that his right to a speedy trial was violated, *Brady* material was not turned over by the government, and prejudicial testimony was admitted into evidence are all without merit.

Affirmed.

GERALD L. SHARGEL, New York, New York (Judd Burstein, New York, New York, Graham Hughes, New York, New York, Michael Rosen, New York, New York, of counsel and on the brief), *for Defendant-Appellant.*

GEOFFREY S. MEARNS, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York (James Orenstein, Laura A. Ward, Assistant United States Attorneys, Zachary W. Carter, United States Attorney for the Eastern District of New York, Brooklyn, New York, of counsel), *for Appellee.*

CARDAMONE, *Circuit Judge*:

This appeal by Thomas Gambino from his judgment of conviction for racketeering consisting of illegal gambling and loansharking, and for conspiracy to engage in racketeering raises several issues. The first is whether governmental delay resulted in a violation of the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1988 & Supp. II 1990) (Act). The second issue relates to allegedly newly discovered evidence, consisting of a letter tending to impeach the credibility of the government's principal witness and a tape recording of the same witness, alleged to contain exculpatory *Brady* material that was not turned over to defense counsel. And the third issue is a challenge to the prosecution's redirect examination of the government's expert witness.

The Gambino organization, one of the most notorious organized crime families in the United States, was the subject of a series of investigations that involved an immense amount of electronic surveillance. These investigations, which culminated in the conviction of the organization's leader, John Gotti, along with other high-ranking members, was a much-trumpeted triumph for law enforcement. One of these high-ranking members investigated and prosecuted is appellant Gambino, alleged by law enforcement officials to be a captain in the organization that bears his family name. He complains he was unfairly targeted by investigators because of that name. The jury thought otherwise, not believing it was his name at which the world grew pale, but the criminal activities associated with it. After a lengthy trial, it found him guilty.

I SPEEDY TRIAL ACT

We turn now to the first issue. The Speedy Trial Act requires that a defendant's trial begin within 70 days of the date he was indicted or his first appearance before a judicial officer, whichever date last occurs. *Id.* § 3161(c)(1). Most of the legal issues surrounding the application of the Speedy Trial Act have been long settled. But the complicated history of the interrelated prosecutions of the Gambino organization has led to a sequence of events without exact legal precedent. The various justifications advanced by the government for the delay warrant a somewhat detailed discussion. In the end, although the government violated its duty to accord appellant a speedy trial, the district court's failure to dismiss the indictment we think was harmless error.

A. Chronology of Gambino's Indictments and Trial

Gambino was indicted along with John Gotti, Salvatore Gravano, and Frank Locascio on December 12, 1990. The indictment charged appellant with two counts of racketeering and racketeering conspiracy in violation of 18 U.S.C. § 1962(c) and (d). The predicate racketeering acts alleged were violations of 18 U.S.C. §§ 2 and 1955 (illegal gambling business) and 18 U.S.C. §§ 892 and 894 (loansharking). The district court declared the case complex and entered an order of excludable delay pursuant to § 3161(h)(8)(A) of the Act.

On June 26, 1991 Gambino moved to dismiss the charges against him, asserting that a portion of the government's proof against him was derived from his immunized testimony given before an earlier grand jury. The trial judge deferred ruling on appellant's request for an evidentiary hearing pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972), until the completion of his trial. The

hearing was ultimately held on July 16, 1993, at which time Gambino's *Kastigar* motion was denied.

In the meanwhile, after an adjournment of a trial date requested by Gambino's co-defendants, a scheduling conflict arose because appellant's trial in state court was set to begin in January 1992. As a result of this conflict the government had to move for a severance of Gambino's trial -- to which he acceded -- from that of his co-defendants. Gravano, another of the original defendants, pled guilty and then entered into a cooperation agreement with the government. The other two defendants, Gotti and Locascio, went to trial and were found guilty on April 2, 1992.

Four months later, on August 4, 1992, a superseding indictment was filed against Gambino together with two new co-defendants, Giuseppe Gambino and Philip Loscalzo. The charges against appellant in this indictment were, except for the addition of charges for violations of the Travel Act, 18 U.S.C. § 1952, as a predicate racketeering offense and as a separate offense, identical to those in the original. At a pretrial status conference held on August 21, 1992, the government declared its readiness to proceed within 70 days. Defendants requested a trial date after the second week of January 1993 to allow the newly added defendants' counsel time to prepare. A trial date was set for February 1, 1993 and, due to the complexity of the case, the trial judge entered a § 3161(h)(8)(A) order of excludable delay for the period from August 21, 1992 to February 1, 1993.

Gambino's counsel moved on September 24, 1992 either for a severance of his client's trial or for an adjournment of the trial date because that date conflicted with other matters he had scheduled. Both motions were denied. During the proceedings, Gambino's co-counsel observed that "if this case went in May instead of February it would not be the end of the world." *United States v. Gambino*, 818 F.

Supp. 541, 543 (E.D.N.Y. 1993). Two weeks later, on October 9, defense counsel renewed his motion for adjournment of the trial date, informing the court, "Our case doesn't involve any speedy trial problems." *Id.* at 544. Despite this statement, a little less than two months later, on December 7, 1992, Gambino moved for dismissal of the superseding indictment because the government had violated Gambino's right to a speedy trial. The motion averred that the speedy trial clock had run between the conclusion of the Gotti trial on April 2, 1992 and the filing of the superseding indictment filed four months later, on August 4, a period of 124 days, well in excess of the statutorily permitted 70 days to commence trial. The motion was denied in a written memorandum and order. *See* 818 F. Supp. 541.

B. Government Reasons for Delay

The government has advanced several reasons for its delay in bringing Gambino to trial: (1) complexity of the case, (2) tolling of the speedy trial clock by Gambino's *Kastigar* motion, and (3) waiver of the Act's protections by defense counsel's tactics. The district court added another, (4) the addition of the new co-defendants. Each of these proffered reasons will be discussed in turn.

1. Complexity. In the above chronology the precise period of delay complained of is the 124 days between the April 1992 conclusion of the Gotti and Locascio trial on the original indictment and the first pretrial conference on the superseding indictment filed against Gambino in August 1992. Gambino concedes that the Act was tolled after the first indictment by the § 3161(h)(8)(A) order of excludable delay on account of complexity entered on December 21, 1990. The authorized exclusion requires the trial court to find and explain why the interests of justice outweigh the interests of the public and the defendant in a speedy trial. The court is

vested with broad discretion to grant this exclusion when in its view the case's complexity makes it necessary to grant counsel further time to prepare in order to ensure a fair trial. *See United States v. Rojas-Contreras*, 474 U.S. 231, 236 (1985).

Gambino asserts that this tolling was effective only until the end of the Gotti trial. He maintains the speedy trial clock restarted after that trial and expired well before a new finding of complexity and a corresponding order of excludable delay were entered on August 21, 1992 with respect to the superseding indictment. Neither appellant's counsel nor the government needed additional preparation time and, but for the government's severance motion, appellant continues, his trial would already have been complete. Given that only the newly added co-defendants Loscalzo and Giuseppe Gambino required additional time, and the August 1992 adjournment of trial order was entered chiefly on their behalf, Gambino reasons, any complexities with respect to him no longer counted after the Gotti trial ended.

The government insists, in response, that the case against Gambino himself never ceased to be complex, and that the second § 3161(h)(8)(A) order entered in August 1992 merely confirmed the continuing complexity of a case involving hundreds of hours of video and audio tape recordings tracking the structure and criminal activities of the Gambino organization. Moreover, the government asserts, appellant's acquiescence in the August 1992 finding of excludable delay due to complexity prevents him from now raising an argument that the case against him was not complex.

The inherent intricacy of the government's case is not a relevant factor in the present discussion. Were Gambino's trial postponed to the next millennium the proof would still be complex. The length of an exclusion for complexity must be

not only limited in time, but also reasonably related to the actual needs of the case. See *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1198 (2d Cir.)("indefinite delay" not tolerated), *cert. denied*, 493 U.S. 933 (1989); *United States v. LoFranco*, 818 F.2d 276, 277 (2d Cir. 1987) (per curiam); *accord United States v. Clymer*, 25 F.3d 824, 828 (9th Cir. 1994) (continuance under § 3161 (h)(8)(A) may not be open-ended).

Generally a trial court should set at least a tentative trial date in granting a complex case exclusion. See *Beech-Nut Nutrition*, 871 F.2d at 1198; *LoFranco*, 818 F.2d at 277 (order excluding time from speedy trial computation should be "made in anticipation of a particular trial date"). In not doing so, it risks having the exclusion "used either as a calendar control device or as a means of circumventing the requirements of the Speedy Trial Act." *LoFranco*, 818 F.2d at 277. Thus, we think the December 1990 order of excludable delay is best understood as having been made in contemplation of the commencement of trial on the original indictment. Despite the fact that his own case had been severed, Gambino's speedy trial clock therefore ceased to be tolled when that trial took place.[1]

The later finding of complexity made in August 1992 failed to set forth the reasons why the case against Gambino continued to be complex for purposes of the exclusion. Nor did that order operate to cure any Speedy Trial Act violation that might already have occurred since an order of excludable delay has no retroactive effect. *See United States v.*

---

[1] Because Gambino asserts only that the speedy trial clock restarted at the conclusion of the April trial, we need not, and do not, express any opinion as to whether the relevant time to restart the calculation would be the commencement, or the conclusion, of that trial.

Tunnessen, 763 F.2d 74, 77 (2d Cir. 1985). As appellant correctly points out, the August 1992 order was entered on behalf of co-defendants, granting their counsel time to get ready; it did not reflect appellant's counsel's need to prepare.

As the government now concedes, the appropriate procedure would have been for it to have requested a status conference with respect to Gambino's trial at the time its motion for a severance was granted, and to have obtained a new order of excludable delay. Alternatively, the first indictment could have been dismissed until the superseding one was prepared and filed, thus tolling the speedy trial clock pursuant to § 3161(h)(3)(B)(6). None of those steps was taken by the prosecution. We are unable now to recast the procedure it followed so as to create a limitless opportunity for prosecutorial procrastination.

2. Gambino's *Kastigar* Motion. A second ground put forward by the government to excuse its delay is that Gambino's speedy trial clock was tolled when he filed a pretrial *Kastigar* motion in June 1991. As discussed above, decision on this motion was deferred until the conclusion of his trial. It is the government's contention that the entire period of time during which this motion was pending is excludable under the Act as "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(F). Noting that the government itself had requested the postponement of the *Kastigar* hearing until the conclusion of the trial, the district court rejected this argument as "disingenuous." 818 F. Supp. at 545.

The Supreme Court has said that the time from the filing of a pretrial motion until the conclusion of a hearing on that motion is excludable from the Act's 70-day limitation

without regard to whether the delay is or is not reasonably necessary. *See Henderson v. United States*, 476 U.S. 321, 330 (1986); *see also United States v. Matsushita*, 794 F.2d 46, 51 (2d Cir. 1986). Hence, a defendant having made a motion cannot complain if its disposition is not expeditious; *all* the time consumed in deciding the motion is attributable to the defendant.

In the case at hand we are faced with the not uncommon circumstance of a trial judge postponing an evidentiary hearing until the conclusion of the case in chief. In such circumstance, the pendency of the motion no longer consumes the court's time and attention. The motion has in effect been tabled. Yet the government would have us rule that the fact of a pending motion cancels the time requirements of the Speedy Trial Act. Obviously were we to so hold, perpetual postponements would become routine in every case where a defendant seeks an evidentiary hearing.

The question is whether the Supreme Court's ruling in *Henderson* compels this result. Two circuits have recently disagreed as to the answer. In *United States v. Riley*, 991 F.2d 120 (4th Cir.), *cert. denied*, 114 S. Ct. 392 (1993), the Fourth Circuit ruled that when a hearing on a pretrial suppression motion is deferred until after trial, all of the time from the filing of the motion until its disposition is properly excluded under § 3161(h)(1)(F). It said that a motion so deferred does not "lose[e] its character as a 'pretrial' motion for purposes of § 3161." 991 F.2d at 123. *Riley* also noted that Fed. R. Crim. P. 12(b) "does not define the term 'pretrial by whether a motion is *in fact* decided before trial." *Id.* (Emphasis in original). In contrast, *United States v. Clymer*, 25 F.3d 824 (9th Cir. 1994), construing the same subdivision of § 3161(h) stressed the word "resulting" rather than the word "pretrial." The Ninth Circuit thought it was error to exclude all delay that coincides with the motion's pendency

because delay under the express terms of the Speedy Trial Act may be excluded "only when it in some way results from the pendency of the motion." *Id.* At 830.

We agree with the Ninth Circuit that Congress envisioned that the speedy trial clock be tolled when the expenditure of judicial resources to decide the motion would interfere with the case expeditiously proceeding to trial, and not tolled when the postponement of a pretrial motion until after trial does not effect a trial court's ability to proceed. We believe therefore Gambino's pretrial motion did not toll his speedy trial clock from the time that the hearing on the motion was postponed until after his trial. The government may not therefore rely on the pendency of this motion to excuse its delay. Were we to agree with the Fourth Circuit, the pretrial motion would have tolled the speedy trial clock and that would of course completely excuse the government's delay.

3. Waiver. As a result of defense counsel's trial strategy, the government contends the Act's protections were waived. Whether the Act may be waived is presently an issue of first impression in this Circuit. We join with every circuit that has addressed the issue in finding that defendants generally may not elect to waive the protections of the Act. *See United States v. Keith*, 42 F.3d 234, 238 (4th Cir. 1994); *United States v. Saltzman*, 984 F.2d 1087, 1091 (10th Cir.), *cert. denied*, 113 S. Ct. 2940 (1993); *United States v. Willis*, 958 F.2d 60, 63 (5th Cir. 1992); *United States v. Kucik*, 909 F.2d 206, 210-11 (7th Cir. 1990), *cert. denied*, 498 U.S. 1070 (1991); *United States v. Berberian*, 851 F.2d 236, 239, (9th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *United States v. Ray*, 768 F.2d 991, 998 n.11 (8th Cir. 1985); *United States v. Pringle*, 751 F.2d 419, 434-35 (1st Cir. 1984); *United States v. Carrasquillo*, 667 F.2d 382, 389 (3d Cir. 1982).

The reason why a defendant cannot waive the time constraints of the Speedy Trial Act is that the public has as great an interest in a prompt criminal trial as has the defendant. Certainly, the public is the loser when a criminal trial is not prosecuted expeditiously, as suggested by the aphorism, "justice delayed is justice denied." The legislative history of the Act confirms the importance of the non-waiver rule. *See Pringle*, 751 F.2d at 433 (citing S. Rep. No. 212, 96th Congress 1st Sess. 28-29 (1979), *reprinted in* A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 182 (Fed. Judicial Center 1980). Thus, when Congress considered this issue, it limited waiver of the 70-day speedy trial requirement to narrowly defined circumstances, *i.e.*, a failure to move for dismissal prior to trial or prior to the entry of a guilty or *nolo contendere* plea. 18 U.S.C. § 3162 (a)(2).

Nonetheless, several circuits have crafted an exception to the non-waiver rule, holding that when defendant's conduct causes or contributes to a period of delay, that time may be excluded from the running of The speedy trial clock. *See Pringle*, 751 F.2d at 434-35 (exception necessary to prevent defendants from "lulling the court and prosecution into a false sense of security only to run around later and use the waiver-induced leisurely pace of the case as grounds for dismissal"); *Kucik*, 909 F.2d at 211 ("Where a defendant actively participates in a continuance ... he cannot then 'sand-bag' the court and the government by counting that time in a speedy trial motion"); *see also, e.g., United States v. Fields*, 39 F.3d 439, 442-43 (3d Cir. 1993) (approving *Pringle* rule in dicta); *United States v. Kington*, 875 F.2d 1091, 1108 (5th Cir. 1989)(in dicta calling the *Pringle* exception a "sensible maxim").

Where the public's interest in swift justice is not disregarded, such an exception makes good sense. The reason

is plain. The provisions of the Speedy Trial Act are not to be mistaken for the rules of a game where defense counsel's cunning strategy may effectively subvert Congress' goal of implementing sound trial management. *See United States v. Vasquez*, 918 F.2d 329, 337 (2d Cir. 1990); *see also United States v. Beech-Nut Nutrition*, 677 F. Supp. 117, 118 (E.D.N.Y. 1987) (Speedy Trial Act not intended as a "trap" for unwary courts and prosecutors), *aff'd*, 871 F.2d 1181, 1198 (2d Cir.), *cert. denied*, 493 U.S. 933 (1989). It is possible, of course, that an overly broad application of the exception could swallow the non-waiver rule, permitting a waiver to be found whenever a defendant fails to object to continuance. *See Keith*, 42 F.3d at 239; *Willis*, 958 F.2d at 64. Were such to result, it would subvert Congress' aim that delays be permitted only as provided for in the Act. *Id.* at 64.

As a result, those courts recognizing the exception have placed tight restrictions on the finding of waiver. In *Willis*, the Fifth Circuit applied the *Pringle* exception to permit waiver under the very narrow circumstances where "defendant requests a continuance under an erroneous interpretation or application of one of the Act's provisions and the district court simply errs in its application of the Act to the defendant's request." *Id.* The Fourth Circuit, confronted with a continuance granted at government request without defense objection and although the trial court had failed to perform an "ends of justice" analysis, found the *Willis* exception too narrow. It held instead that if, upon review of the entire record, an appellate court concludes defendant affirmatively consented to a continuance, and that if the reasons for such a continuance would be supported by an ends of justice finding, then defendant may not assert a Speedy Trial Act violation for the period of the continuance. *Keith*, 42 F.3d at 239-40.

We do not think the *Pringle* exception swallows the non-waiver rule where appellant treats the protections of the Speedy Trial Act as a game of strategy. The trial judge plainly believed that Gambino's counsel had engaged in precisely this kind of gamesmanship, consistently requesting or acceding to delays throughout the pretrial stage; then making use of those same delays -- either asked for or acquiesced in -- by demanding that his indictment be dismissed. Four times in its opinion the district court cites Gambino's assertion that "the truth is that the Speedy Trial Act is obviously designed to permit defendants to take advantage of government errors." 818 F. Supp. at 544, 547-48.

Defense counsel never alerted the trial court or the prosecutor to the potential speedy trial problem. On the contrary, after the superseding indictment was returned, counsel repeatedly sought to have the trail date postponed. *See* 818 F. Supp. at 543-44. At a status conference held on October 9, 1992, counsel specifically informed the court that "our case doesn't involve any speedy trial problems." *Id.* At 544. Under some circumstances, such tactics might constitute waiver-creating delay. But here the right to a speedy trial guaranteed under the Act had already been violated, and defense counsel's delaying strategy may not be used as a reason retroactively to waive this guaranteed right. *See Tunnessen*, 763 F.2d at 77. If a violation occurred between April and August 1992, as Gambino insists, his counsel's later requests for deferral in October 1992 could not undo the earlier violation.

The October comments might properly have been considered by the trial court when it made a factual finding that appellant engaged in a consistent campaign of delay throughout the pretrial period, commencing well before the speedy trial clock was violated. Such a factual finding --

were it based on significant pre-violation acts -- might have been sufficient to support the conclusion that Gambino had waived his Speedy Trial rights. Despite making this finding, there is no indication in the district court's opinion that it was conscious of the need to identify waiver occurring before the violation occurred. Nor does the record contain adequate support for its conclusion that Gambino's campaign of delay began before the alleged violation of the Act.

Further, we are able to identify only two instances of pre-violation conduct possibly pointing to waiver. The first is Gambino's refusal to seek a severance from the Gotti trial despite his upcoming state prosecution. This unusual strategy might suggest a designed plan of forcing the government to request the severance, thereby helping to preserve defendant's speedy trial claim. Had defense counsel himself requested a severance due to Gambino's conflicting state trial, as one would ordinarily expect him to do, the speedy trial clock might have been indefinitely tolled. *Cf. United States v. Fernandez*, 694 F. Supp. 858, 860-61 (S.D. Fla. 1988) (defendant's assertion of his right to severance a factor weighing heavily in favor of excluding three to four year delay arising in part from severance). Nonetheless, we do not think the failure to ask for a severance supports a finding of waiver. Even viewed as strategy, its chances of success were remote. The government could have sought an order of excludable delay under § 3161(h)(1)(D) of the Act, thereby obtaining the exclusion of "delay resulting from trial with respect to other charges against the defendant." *Id.*

The second instance of pretrial conduct potentially supporting a finding of waiver was cited by the trial court. The government asserts without contradiction that Gambino requested that his case be calendared after the summer of 1992, in effect seeking the very delay of which he now complains. 818 F. Supp. at 544. However, it appears that

Gambino made this calendaring request to the prosecutor, not to the court; nor does it appear that the court was even informed of defense counsel's calendaring preference until February 1993, well after the alleged date of violation had passed. Thus, we are unable to conclude that this request amounts in itself to *Pringle*-type conduct, "lulling *the court* and prosecution into a false sense of security." 751 F.2d at 434-35 (emphasis added).

In sum, a review of the record fails to uphold the trial court's view of Gambino's counsel's conduct. Absent a finding that defense counsel's deliberate pretrial strategy of delay and his disclaimer of any speedy trial problems preceded the government's violation of the Act, there can be no holding that such conduct amounted to waiver.

4. Addition of New Co-Defendants. An alternative ground was advanced by the district court for refusing to dismiss the indictment. The Act permits a "reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and no motion for severance has been granted." 18 U.S.C. § 3161(h)(7). Thus, the speedy trial clock in cases involving multiple defendants begins with the running of the clock for the most recently added defendant. *See United States v. Pena*, 793 F.2d 486, 489 (2d Cir. 1986); *United States v. Piteo*, 726 F.2d 50, 52 (2d Cir. 1983), *cert. denied*, 466 U.S. 905 (1984). This rule promotes judicial efficiency by allowing the prosecution flexibility in the combining of criminal trials. *See Pena*, 793 F.2d at 489. The only inquiry made in such multiple defendant cases is whether the delay is "reasonable." *See, e.g., United States v. Tobin*, 840 F.2d 867, 869-70 (11th Cir. 1988) (looking to "totality of the circumstances prior to trial" in concluding delay reasonable to achieve joint trial).

Under the circumstances of this case the belated joinder of new co-defendants took place too late to reset the appellant's speedy trial clock. Appellant's case was joined with those of Loscalzo and Giuseppe Gambino in the superseding indictment only *after* the challenged delay. We are unable to identify any cases holding that joinder effectively resets a defendant's speedy trial clock to zero after that defendant's speedy trial right has already been violated by delay. Such a result, moreover, would open the door to prosecutorial abuse, permitting 70-day extensions to be unilaterally obtained by means of sequentially indicting co-defendants.

In sum, none of the justifications proffered by the government or the district court adequately excuses the delay in bringing Gambino to trial. The district court erred therefore in not finding that the Speedy Trial Act was violated.

C. Harmless Error

We proceed to consider whether such error was harmless. As a preliminary matter, we must determine what relief the district court ought to have granted, once a violation of the Act occurred. If a criminal defendant is not brought to trial within 70 non-excluded days from the filing of an indictment, the mandatory remedy provided by the Act is dismissal of the indictment on motion of the defendant, although the court may, within its discretion, dismiss the case without prejudice. 18 U.S.C.§ 3162(a)(2). Once an indictment has been dismissed under the Act, any resultant conviction must be overturned, and the defendant may be retried only upon the obtaining and filing of a new indictment. *United States v. Perez-Reveles*, 715 F.2d 1348, 1353 (9th Cir. 1983); *United States v. Antonio*, 705 F.2d 1483, 1486-87 (9th Cir. 1983).

At issue here is what relief is available to a defendant when the original indictment's time on the speedy trial clock has run out, but in the meanwhile a superseding indictment has been filed by the time defendant moves for dismissal of the original indictment. The government contends that in such a situation, the defendant is entitled only to dismissal of the original indictment, that is, since he has already been reindicted, to no relief at all. We disagree. A superseding indictment inherits the clock of the original, see *United States v. Roman*, 822 F.2d 261, 265-66 (2d Cir. 1987), so that any violation of the original is imputed to it, and consequently it is the later indictment that must be dismissed.

Nor should dismissal somehow resurrect any preceding indictment. Although the relief originally requested by Gambino was only dismissal of the superseding indictment with reinstatement of and trail upon the original, that is not the remedy provided for by the Act. The government violates the Act at its peril. Forcing the government to reindict a defendant after a Speedy Trial Act violation may seem a "purposeless formalism," 818 F. Supp. at 548, but it is the sanction Congress saw fit to impose, and it was therefore the district court's duty to impose it.

We recognize that the district court said that had it dismissed the indictment, it would have done so without prejudice. In so ruling, the court correctly applied the statutory factors governing prejudice: "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." 18 U.S.C. § 3162(a)(2). Given the seriousness of Gambino's crime and the sedulity of the prosecution, the court correctly concluded that dismissal with prejudice would not have been warranted. 818 F. Supp. at 547-48. Certainly, Gambino's counsel's post-violation statement, "Our case

doesn't present any speedy trial problems," 818 F. Supp. at 544, supports the conclusion that no prejudice was felt.

Given dismissal without prejudice, the government would have been free to seek to have Gambino reindicted; and even the appellant now concedes that reindictment would have been inevitable. As the government had already managed in fact to indict Gambino a total of three times on virtually identical charges, *see* 818 F. Supp. at 542-43, we may comfortably assume that a fourth indictment would have been readily forthcoming. Thus, Gambino's position today would be no better even if the district court had dismissed the superseding indictment.

We conclude, accordingly, that the error was harmless, and that Gambino's conviction must stand. Nonetheless, we hasten to add that our holding is not a signal that affirmance of a district court's failure to dismiss an indictment on harmless error grounds, so long as a "without prejudice" analysis is undertaken as mandated by the Act, will routinely follow. On the contrary, since we review the question of prejudice *de novo*, non-dismissal in the event of a violation will always risk nullifying an entire trial. Reversible error, in a case as complex and hard-fought as this one, would have been costly indeed.

II NONDISCLOSED EVIDENCE

A. Gravano's Testimony and His Alleged Perjury

The trial of Thomas and Giuseppe Gambino began on April 19, 1993, Loscalzo's trial having been severed due to his poor health. A key part of the government's case was the testimony of Salvatore Gravano, who was originally indicted with appellant, but later cooperated with the government at a series of criminal trials involving various members of the Gambino organization. Aside from Gravano's crucial

testimony, the bulk of the government's case consisted of circumstantial evidence obtained from electronic surveillance of the Gambino organization's operations. All the proof presented was extensively reviewed by the district court in a published opinion, *United States v. Gambino*, 835 F. Supp. 74, 77-85 (E.D.N.Y. 1993) (denying Thomas Gambino's motion for a new trial). Gravano's testimony, according to the district court's assessment, connected only Thomas Gambino with the Connecticut loansharking operation, thus tending to exonerate Giuseppe Gambino. *Id.* at 83-85. The surveillance evidence against Thomas Gambino was also markedly more substantial than that against Giuseppe Gambino. *Id.* at 77-81.

On May 11, 1993 the jury acquitted Giuseppe Gambino and convicted appellant Thomas Gambino. The next day, in a separate case, *United States v. Conte*, No. 93 CR 85 (ILG) (E.D.N.Y. guilty plea entered June 20, 1994), the government submitted a letter (the *Conte* letter) to the district court in support of its motion to detain defendant Pasquale Conte pending trial. The letter disclosed that Gravano had engaged with Conte -- another captain in the Gambino organization -- in a conspiracy to import and distribute heroin. As a result of this disclosure, Gambino filed a motion for a new trial on the basis of newly discovered evidence tending to impeach the credibility of a government witness.

Following oral argument on this motion on October 6, 1993 appellant alerted the court to the existence of additional newly discovered impeachment evidence. During pretrial discovery in yet another Gambino organization case, *United States v. Crea*, 853 F. Supp. 72 (E.D.N.Y. 1994), defense counsel had received materials developed in 1989 from electronic surveillance conducted by the Kings County District Attorney's Office and the Federal Bureau of Investigation (FBI) at a construction trailer on 64th Street in Brooklyn,

New York. Included among these materials was a transcript of witness Gravano instructing an associate in the art of testifying falsely to a grand jury (the Trailer Tape):

> You're called to the grand jury. You gotta take the fifth. Alright so far? Now they give you immunity. What do you do?
>
> * * *
>
> Now I told him there is three things: common sense, common sense is one part, seventy-five percent of the answers. Another ten or fifteen percent . . . (Inaudible) you gotta dance and bob and weave. One, I didn't remember, I don't think so, or to the best of my knowledge. Okay? Let's say fifteen percent, so that's seventy-five percent, so we're up to ninety percent. Ten percent, you out and out lie.

Gambino's counsel claimed that because the FBI assisted in the investigation in which the Trailer Tape was obtained, the government obviously knew of its existence and was obligated to turn it over to Gambino as exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The government submitted responding affidavits stating that none of the Assistant United States Attorneys who worked on the prosecution of Gambino or any related cases were aware of the existence of the Trailer Tape before being alerted to it by defense counsel.

Gambino moved under Rule 33 for a new trial "in the interests of justice" on the grounds that the government's failure to disclose this newly discovered exculpatory *Brady* material entitled him to such relief. Fed. R. Crim. P. 33. The district court on October 26, 1993 denied the motion. 835 F.

Supp. at 96. Appellant appeals from the denial of this motion.

B. Motion for a New Trial

Because motions for a new trial are disfavored in this Circuit the standard for granting such a motion is strict; that is, newly discovered evidence must be a sort that could, if believed, change the verdict. *See United States v. Gilbert*, 668 F. 2d 94, 96 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 2014 (1982). The trial court has "broad discretion" to decide Rule 33 motions based upon its evaluation of the proof produced, *see United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992), and its ruling is deferred to on appeal because, having presided over the trial, it is in a better position to decide what effect the newly discovered materials might have had on the jury, *see United States v. Petriollo*, 821 F.2d 85, 88 (2d Cir. 1987). This is particularly true where, as here, the outcome of the trial depended upon a complicated conglomeration of surveillance evidence regarding the structure of a vast criminal conspiracy.

The district court summarized the extensive evidence upon which Gambino's conviction was based in its exhaustive published opinion. 835 F. Supp. at 77-85. Appellant's appeal hinges in large part on attacking the soundness of that court's assessment of the trial evidence. We will not disturb a trial court's factual findings regarding the natture and weight of the evidence, unless those findings are clearly erroneous. *See United States v. Diaz*, 922 F.2d 998, 1006 (2d Cir. 1990), *cert. denied*, 500 U.S. 925 (1991).

1. The *Conte* Letter

The *Conte* letter implicates Gravano in narcotics trafficking. The letter detailed Gravano's attempt, at the

request of John Gotti, to obtain from Conte some of the proceeds from his heroin importing schemes; the attempt never achieved fruition because of the intervening arrests of Gravano and Gotti. Plainly this letter is *Brady* material that tends to impeach the credibility of a government witness and, as such, it should have been made available to the defense in appellant's trial. *See Giglio v. United States*, 405 U.S. 150 (1972).

Nevertheless, information not disclosed to the defense creates constitutional error warranting a new trial only when that information is material, *i.e.*, when it "creates a reasonable doubt that did not otherwise exist." *United States v. Agurs*, 427 U.S. 97, 112 (1976). To determine whether a defendant was deprived of his due process right to a fair trial, the court must evaluate the omission in the light of the entire record: "If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *Id.* at 112-13. In *United States v. Bagley*, 473 U.S. 667 (1985), the Supreme Court restated the *Agurs* test for deciding whether nondisclosed impeachment evidence is "material in the sense that its suppression undermines confidence in the outcome of the trial." *Id.* at 678. It explained that materiality exists "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682.

Recognizing the difficulty of meeting the *Agurs-Bagley* "reasonable probability" standard of materiality, Gambino seeks to invoke a less rigorous test by declaring that the *Conte* letter demonstrates that Gravano committed perjury on the stand. Gravano was not specifically asked and so did not specifically deny that he had ever engaged in drug dealing. It was in earlier Gambino organization trials -- at which he appeared as a witness -- that Gravano declared that the rules

of the Gambino organization prohibited dealing in narcotics. *See United States v. Gotti*, No. 90 CR 1051 (S-I) (ILG) (E.D.N.Y. April 2, 1992); *United States v. Pape*, No. 92 CR 0159 (ILG) (E.D.N.Y. November 6, 1992); *United States v. Orena*, 821 F. Supp. 870, 871 (E.D.N.Y. 1992).

When the prosecution knowingly makes use of perjured testimony, the standard for materiality is reduced to a showing of "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103; *see also Bagley*, 473 U.S. at 678; *United States v. Stofsky*, 527 F.2d 237, 245 (2d Cir. 1975) (without false testimony jury might have reached different result), *cert. denied*, 429 U.S. 819 (1976). In the instant case the *Conte* letter -- not turned over to defense counsel -- contradicted statements regarding the drug business to which Gravano had testified in other trials. Even assuming Gravano perjured himself and assuming perjury in other trials would be relevant to Gravano's testimony in this trial, we do not believe the *Conte* letter material in the constitutional sense. Had defense counsel had access to the letter, we do not believe it would likely have affected the outcome of the trial, or, in other words, that with the letter in evidence Gravano's credibility would have been so diminished that Gambino would not have been convicted.

But we are unpersuaded that any perjury occurred. Gravano had stated under oath in those earlier trials of Gambino organization members that he and the Gambino organization had a principle of not dealing in drugs. Yet, that policy statement is not flatly inconsistent with his having become involved on his own, and John Gotti's, behalf in a heroin importation conspiracy. It is at most evidence that Gravano did not adhere to the rules of the organization of which he was a high-ranking member. Nevertheless even a direct conflict in testimony does not in itself constitute

perjury. *See United States v. Bortnovsky*, 879 F.2d 30, 33 (2d Cir. 1989); *see also United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992). Consequently, the lower standard of materiality is not triggered.

The more rigorous *Agurs-Bagley* test applied so that reversal is warranted only if there is a reasonable probability that disclosing the *Conte* letter to the defense would have resulted in a different verdict. That test has not been met. As the district court noted, "Gravano's plea agreement with the government and his criminal past were dissected and laid before the jury on cross-examination -- a criminal past which included nineteen murders, labor racketeering, extortion, shylocking, obstruction of justice and gambling." 835 F. Supp. at 88. Proof before the jury that this witness was involved in an abortive conspiracy to import heroin and that he violated the policies of his own organization would scarcely have rendered his gloomy past worse.

Nondisclosure of cumulative evidence tending only to further impeach a witness' general credibility is not grounds for granting a Rule 33 motion. *See United States v. Helmsley*, 985 F.2d 1202, 1210 (2d Cir. 1993); *United States v. White*, 972 F. 2d 16 (2d Cir.), *cert. denied*, 113 S. Ct. 669 (1992). Moreover, the district court's finding -- based on its thorough review of the evidence -- that Gambino's conviction rested on a sound evidentiary basis exclusive of Gravano's testimony, is a factual finding entitled to deference on appeal. The proof of this witness' additional wrongdoing revealed in the *Conte* letter therefore provides no basis for disturbing the jury's verdict.

In light of this holding we need not decide the questions of whether a defendant may obtain the advantage of the less burdensome standard simply by showing that a government witness has given perjured testimony at related

trials; or whether, as the government urges, defense counsel had access to the essential fact of Gravano's drug involvement so that the *Conte* letter was not "suppressed." *See United States v. Zackson*, 6 F.3d 911, 918 (2d Cir. 1993); *United States v. Esposito*, 834 F.2d 272, 275 (2d Cir. 1987); *United States v. Gaggi*, 811 F. 2d 47, 59 (2d Cir.), *cert. denied*, 107 S. Ct. 3214 (1987).

2. The Trailer Tape

We turn now to a consideration of the second alleged *Brady* violation, the suppression of the Trailer Tape transcript. The Trailer Tape is quintessential *Brady* material. Rarely does a defense attorney have such a useful weapon for attacking the credibility of a government witness. Gravano is recorded on the Trailer Tape as giving this direct instruction for confounding a grand jury: "Ten percent of the time, you out and out lie."

But in this case defense counsel had other weapons ready at hand. As already noted, Gravano was cross-examined at length and with "surgical precision," 835 F. Supp. at 88, about his extensive criminal history. Defense counsel referred to Gravano in his opening statement as a "serial killer" who had "participated in the slaughter and deaths of nineteen human being." Gravano committed at least two of those murders in order to prevent the victims from testifying before a grand jury, and he admitted other acts of obstructing justice, including bribing jurors, in an attempt to frustrate the prosecution of Gotti. 835 F. Supp. at 95. With this grim history laid before them, the jury had a fair opportunity to evaluate the witness' credibility. The existence of the Trailer Tape does nothing to undermine confidence in Gambino's conviction, nor to suggest any "reasonable probability" that the jury would have reached a different verdict had the transcript been available to them. The Trailer

Tape does not therefore amount to material evidence the suppression of which would warrant a new trial.

Finding a lack of materiality, we need not decide whether the Trailer Tape was "suppressed," in other words, whether the knowledge of the tape's existence should be imputed to the prosecution, based on its having been available to the F.B.I. in 1989. Nonetheless, it should be noted that we recently addressed this precise question in the context of Gotti's and Locascio's *Brady* appeal -- also predicated on nondisclosed evidence tending to impeach Gravano -- holding "[w]e will not infer the prosecutors' knowledge simply because some other government agents knew about the report." *United States v. Locascio*, 6 F.3d 924, 949 (2d Cir. 1993) (citing *Morgan v. Salamack*, 735 F.2d 354, 358 (2d Cir. 1984) and *United States v. Quinn*, 445 F.2d 940, 944 (2d Cir.) (Holding that knowledge on the part of one arm of government does not imply knowledge by the prosecutor), *cert. denied*, 404 U.S. 850 (1971)), *cert. denied*, 114 S. Ct. 1645 (1994). Crediting the government's affidavits, the trial court found in addition as a factual matter that the prosecution in Gambino's case did not know of the Trailer Tape's existence.

It thus appears that there existed an adequate basis in law and fact for the finding that the Trailer Tape was not "suppressed." This finding is not however essential to our holding, which is based solely on the non-materiality of the tape as constituting cumulative impeachment evidence. Consequently, we rule that the nondisclosure of the Trailer Tape does not amount to suppression of material evidence warranting a new trial.

III SCOPE OF RE-DIRECT EXAMINATION

A. Agent Gabriel's Testimony

The final issue relates to the propriety of the prosecutor's re-direct examination of a government witness. George Gabriel, an FBI agent qualified as an expert witness on the structure and methods of organized crime organizations, took the stand to interpret the tape recordings obtained in the course of electronic surveillance. The agent described the structure of the Gambino organization and the procedure by which the joint FBI and New York State Organized Crime Task Force investigation conducted surveillance of the Bergin Hunt & Fish Club in Ozone Park, Queens, New York -- a Gambino organization haunt. He then reviewed the tape recordings with the jury, identifying cryptic references to organization members and their criminal activities.

Cross-examination of the agent by defense counsel elicited the facts that earlier surveillance tapes made in 1983 and 1989-90, as well as an earlier search of Gambino's office, had failed to reveal any evidence connecting him with loansharking or organized gambling. In fact, those tapes had implicated appellant in unrelated offenses concerning the garment industry, and had resulted in his entering a guilty plea in a previous New York State proceeding. The earlier tapes had already been ruled inadmissible in the instant case. But by the fact that they had been made, defense counsel was able to suggest that the government had made Gambino the target of lengthy, fruitless, harassing and perhaps illegal surveillance.

The trial court believed this cross-examination was designed to deceive and mislead the jury. Hence, it ruled that the prosecution would be permitted on re-direct to attempt to dispel any misconceptions created by this line of questioning. The government was prohibited from developing the fact that

previous investigations against Gambino had resulted in his guilty plea in a state proceeding, even though the cross-examination had opened the door for proof respecting such prior conviction. The scope of re-direct instead was limited to demonstrating that the earlier surveillance was not illegal, oppressive, unjustified, or targeted solely against Gambino.

On re-direct the agent stated the earlier investigations had resulted in 11 other indictments involving 30 defendants. He also testified that 12 or 13 persons had already been convicted as a result of those tapes, with further indictments anticipated. Defense requests to cure the prejudicial impression of this testimony by informing the jury that Gambino had been acquitted in one of the cases resulting from the earlier series of tapes were denied. But the trial court -- with the approval of defense counsel -- gave the jury the following limiting instruction:

> I want to make it just as clear as I can possibly make it whether there were convictions with respect to investigations pertaining to other persons has no bearing upon this case.
>
> The determination which the jury will make in this case will be predicated solely upon the evidence as it is presented in this case, and no inference should be drawn by the jury regarding these defendants from the fact that in other cases other persons may have been convicted.

Giuseppe Gambino's counsel, by contrast, in questioning the agent was allowed to enquire whether his client had been prosecuted in any of the previous investigations, and obtained an answer that he had not. Appellant's counsel did not object to this testimony.

After the conclusion of the agent's testimony, defense counsel requested that the agent be recalled in order to elicit the fact of Gambino's former acquittal. This request was denied. Gambino contends on appeal that his conviction should now be reversed because of the unfair prejudice resulting from these evidentiary rulings.

B. Admission of Corrective Testimony

A district court has broad discretion to make a determination that the probative value of evidence outweighs the risk that its admission will result in unfair prejudice. *See United States v. Moon*, 718 F.2d 1210, 1233 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984). Evidentiary rulings are not grounds for reversal except where they are made arbitrarily or irrationally. *See United States v. Blanco*, 861 F.2d 773, 781 (2d Cir. 1988), *cert. denied*, 489 U.S. 1019 (1989). Otherwise inadmissible testimony may be received on re-direct in order to rebut a false impression created by an opposing party during cross-examination. *See United States v. Rosa*, 11 F.3d 315, 335 (2d Cir. 1993); *United States v. Wiley*, 846 F. 2d 150, 156 (2d Cir. 1988). Defense counsel's cross-examination here was deliberately designed to foster a false impression in the jury's mind that for years the government had been unsuccessfully and abusively investigating Gambino. It was this misimpression that the prosecutor was allowed to correct on re-direct by asking the agent about the legality and success of the former surveillance operations.

Appellant contends this corrective attempt may have persuaded the jury that he was one of the unnamed persons convicted as a result of the earlier investigations. In allowing the jury to form such a belief, he insists, the court improperly infringed his due process right "to be tried solely on the basis of evidence presented to the jury." *United States v. Young*, 470 U.S. 1, 18 (1985). We recognize that evidence of a

defendant's prior conviction is inadmissible unless it relates to a disputed issue and unless, further, its probative value outweighs its prejudicial effect. Fed. R. Evid. 403, 404(b); *United States v. Figueroa*, 618 F.2d 934, 939 (2d Cir. 1980).

We reject the notion that admitting this corrective testimony was an abuse of discretion. Under the circumstances, the trial court might well have been justified in allowing the introduction of evidence pertaining to Gambino's earlier guilty plea. But it did not. Rather, the scope of the government's questioning was carefully circumscribed, and the jury was promptly given a limiting instruction, approved by Gambino's counsel, as to what inferences could be drawn from those facts. Moreover, even if it were error to admit this proof, such error would have been harmless in light of the overwhelming record evidence of Gambino's guilt. *See United States v. DeVillio*, 983 F.2d 1185, 1195 (2d Cir. 1993); *United States v. LaSanta*, 978 F.2d 1300, 1306 (2d Cir. 1992).

CONCLUSION

Accordingly, for the reasons stated the judgment of conviction is affirmed.

Appendix B

District Court Decision
on Motion for New Trial

835 F.Supp. 74 (E.D.N.Y. 1993)

UNITED STATES of America, Plaintiff,
v.
Thomas GAMBINO, Defendant.

No. CR-90-1051 (S-3).
United States District Court,
E.D. New York.

Oct. 26, 1993.

Defendant, who was convicted on racketeering charges, moved for new trial. The District Court, Glasser, J., held that: (1) defendant was not entitled to new trial for government's failure to disclose alleged perjury of its witness which occurred in another criminal trial; (2) government was not required under Jencks Act to produce notes taken by government agent during interview of witness; (3) defendant was not entitled to new trial for government's failure to disclose those notes as alleged *Brady* material; (4) knowledge of potential *Brady* material obtained in investigation other than one which led to charges against defendant could not be imputed to government prosecutors in defendant's case; and (5) evidence supported conviction.

Motion denied.

Laura A. Ward, Geoffrey Mearns, Asst. U.S. Attys., Brooklyn, NY, for plaintiff.

Michael Rosen, New York City (Judd Burstein, Gerald L. Shargel, Shargel & Futerfas, New York City, of counsel), for defendant.

Jay Goldberg, New York City.

MEMORANDUM AND ORDER

GLASSER, District Judge:

The defendant was convicted upon a trial by jury of Racketeering, in violation of 18 U.S.C. Sec. 1962(c) (Count One), the predicate acts of racketeering for which were violations of 18 U.S.C. Sec. 1955 (illegal gambling business); 18 U.S.C. Secs. 892 and 894 (extortionate extensions and collections of credit); 18 U.S.C. Sec. 1952 (interstate travel and communication incident to illegal gambling and loansharking), and of Racketeering Conspiracy in violation of 18 U.S.C. Sec. 1962(d) (Count Two). His co-defendant, Giuseppe Gambino, was acquitted on both counts. Jury selection commenced on April 19, 1993 and a verdict was rendered on May 11, 1993. The proceedings are recorded in a transcript of approximately 1700 pages.

The defendant thereafter moved this court for a new trial pursuant to Rule 33, Fed.R.Crim.P. His motion is bottomed upon two grounds: (1) the failure of the government to disclose that Salvatore Gravano perjured himself concerning his personal involvement in narcotics trafficking, and (2) the verdict was against the weight of the evidence.

As regards the first basis of his motion, he contends that "this is a case which hinged upon the credibility of Salvatore Gravano." Memorandum of Law in Support of Defendant's Motion for a New Trial ("Def's Mem." at 2). In furtherance of that contention, he asserts that the "heart of the

defense were the claims that (a) Gravano had lied about perhaps the most crucial event in the case--an alleged meeting with Thomas Gambino to discuss Anthony Megale's guilty plea--and (b) that the government was covering up for him." This assertion is elaborated by alluding to the government's reference to Gravano's cooperation agreement, the continued efficacy of which was conditioned upon his truthfulness and to Gravano's testimony two weeks previously in another trial in the Southern District of New York in which, the defendant claims, Gravano lied under oath.

Prior to discussing the legal underpinnings of the defendant's motion, it would be useful to make a factual assessment of the defendant's averment that his case "hinged upon the credibility of Salvatore Gravano," that his testimony "was, as a functional matter, the *sine qua non* of the government's cases" and that it is "the only way to harmonize Thomas Gambino's conviction and Giuseppe Gambino's acquittal" (Def's Mem. at 3).

Prior to making that assessment, however, it is vital to note and remember that the defendant, Thomas Gambino, was indicted in December, 1990 together with Salvatore Gravano, John Gotti and Frank Locascio. The charges against the defendant in that indictment, from which he was eventually severed, are virtually identical to the charges in the superseding indictment on which he was tried and convicted. Had the defendant not been severed and had Gravano not elected to cooperate with the government, the defendant would have been tried together with Gravano and the other co-defendants.

I

The first significant evidentiary reference to the defendant was presented by the government in an intercepted and recorded conversation between John Gotti and George

Remini on January 17, 1986 in the Bergin Hunt and Fish Club. George Gabriel, a Special Agent of the F.B.I. testified regarding that conversation. Agent Gabriel has been assigned to the Gambino Squad of the F.B.I. since 1985 and was qualified as an expert witness on organized crime families, their structure, methods, means of operation and on the terminology used by members of organized crime families. He identified John Gotti as the Boss of the Gambino Organized Crime Family (Tr. at 194), George Remini as a made member in that family (Tr. at 203), Tommy DeBrizzi as an acting captain in the Gambino Family (Tr. at 206) and Tommy Bilotti as the underboss of the Gambino Family (Tr. at 209). During the course of that conversation Gotti informed Remini that the defendant sent for DeBrizzi on three occasions and DeBrizzi never came, explaining his failure to do so by having been given discretion by Tommy Bilotti to respond or not to the defendant's summons (Tr. at 208-09). Gotti went on to say that he will have the defendant handle the problem with DeBrizzi (Tr. at 211). Of particular significance is Gotti's statement to DeBrizzi that the defendant's people, (Phil Loscalzo and the co-defendant, Giuseppe Gambino) (sometimes referred to hereafter as Joe Gambino) are helping him run DeBrizzi's operation in Connecticut (Tr. at 212) and that he would demote DeBrizzi from an acting captain to soldier and assign him to the defendant. (Tr. at 217-18). Other attributions to Gotti in the conversation as testified to by Agent Gabriel make it plain that the defendant Thomas Gambino was a captain in the Gambino Family (Tr. at 222-24), and photographs received in evidence depict persons identified as DeBrizzi (GX 902-A); Giuseppe Gambino (GX 902-B and C); George Remini, Phil Loscalzo and the defendant (GX 902-D and E); George Remini and the defendant (GX 902-F and G) and Anthony Megale (GX 902-H). (Tr. at 226-28). These photographs were taken on January 22, 1986 on Bogart Avenue in the Bronx, N.Y. (Tr. at 226-27). There are approximately four passing references to acquitted co-defendant Giuseppe

Gambino on that recorded conversation compared to approximately three times as many to the defendant Thomas Gambino which are of more than passing significance.

The government also introduced an intercepted and recorded conversation in which the participants were John Gotti, Frank Locascio and Salvatore Gravano on January 4, 1990 in an apartment above the Ravenite Club at 247 Mulberry Street in New York City (Tr. at 229). Agent Gabriel explained a reference to one Pietro Angelo and Tommy Gambino as signifying that Angelo, deceased in 1985, was a member of this defendant's crew. (Tr. at 255-57, 261). As the conversation continued and the names of many others were mentioned in a variety of contexts, one Carmine Sciandra was identified as a member of Tommy Gambino's crew (Tr. at 279) and Tommy Gambino was described as laughing when Gotti admonished lawyers (Tr. at 284). Not once during the playing of this recorded conversation was the name of Giuseppe Gambino mentioned.

An intercepted and recorded conversation in an apartment above the Ravenite Club on January 17, 1990 was played. Among the participants heard on this recording were Gotti, Locascio, Gravano and Joseph ("Joe Butch") Corrao. In the course of this conversation Gotti is heard to declare that Tommy Gambino is a "skipper," meaning a captain in the Gambino Family. (Tr. at 116, 289). Not once during the playing of this recorded conversation was the name of Giuseppe Gambino mentioned.

A conversation among Gotti, Gravano and Locascio on November 30, 1989 in the apartment above the Ravenite which was intercepted and recorded was played for the jury. On that recording, Gotti is overheard relating a conversation at which Thomas Gambino was present in which accusations were voiced against Neil Dellacroce, a captain in the Gambino Family (Tr. at 307) and in which he related a stated intention

of Paul Castellano to put "young soldiers" ... "in the crews of Tommy Gambino and Joe Butch Corrao." (Tr. at 309). Not once during the playing of this recorded conversation was the name of Giuseppe Gambino mentioned.

A conversation between Gotti and Giuseppe Gambino in the hallway of 247 Mulberry Street on December 14, 1989 was intercepted, recorded and played for the jury. The subject of the conversation was the need to provide a lawyer for Tony Megale who was indicted in Connecticut on December 6, 1989 and arrested on the following day, the expenses a trial would entail, and who would provide for payment of those expenses. (Tr. at 324-26).

Five days later, on December 19, 1989, a conversation between Gotti and Thomas Gambino in that same hallway was intercepted, recorded and played for the jury. The discussion once again centered about the representation of Tony Megale. (Tr. at 327). The testimony of Agent Gabriel regarding that conversation would have permitted the jury to find that Tommy Gambino was going to pay for the services of Tony Megale's lawyer (Tr. at 328, 332); that Tommy Gambino was involved with loansharking (Tr. at 329); that Tommy Gambino was the captain of a crew of which Giuseppe Gambino was a member (Tr. at 330); that Tommy Gambino was keeping Gotti apprised of the events surrounding the indictment of Tony Megale (Tr. at 333); that he pledged his fealty to John Gotti (Tr. at 335, 336); and that Gotti was pleased that Tommy Gambino was available to assist Tony Megale (Tr. at 336).

After the recorded conversations were played for the jury, the government then presented surveillances of the activity in the vicinity of the Ravenite Social Club which were captured on video tape. Thomas Gambino was shown entering and leaving that club on December 19, 1989 and

Giuseppe Gambino was then shown on December 14 and 19, 1989.

The cross-examination of Agent Gabriel established that he was never told that Giuseppe Gambino was ever seen at any gambling operation in Connecticut, nor had he ever been told that Giuseppe Gambino was the recipient of a delivery of money in Connecticut (Tr. at 458-60); that he was involved in money lending (Tr. at 426-32, 442-44); or that he was ever mentioned in any conversation emanating from the Connecticut gambling operation. (Tr. at 431). The cross-examination also revealed that there was no evidence that Tony Megale ever gave any money to Giuseppe Gambino (Tr. at 435); that he was never mentioned in any conversation intercepted in the home of Paul Castellano as being involved in Connecticut gambling or loansharking (Tr. at 437); there was no evidence that Giuseppe Gambino ever delivered any money to John Gotti (Tr. at 442-43); Salvatore Gravano was never overheard to say that Giuseppe Gambino delivered money to Gotti from Connecticut gambling or loansharking operations (Tr. at 444); there was no evidence that Giuseppe Gambino ever gave any money to Megale's lawyer (Tr. at 473); and he was never heard in any conversations regarding Megale's plea (Tr. 480-81).

Salvatore Gravano was the next witness called to testify for the government. He identified the defendant as a captain in the Gambino Family (Tr. at 599, 610); George Remini as his acting captain (Tr. at 612); Skinny Phil, Carmine Sciandra, Petey Castellano, Sal (LNU), Tony Megale, Giuseppe Gambino and Tommy DeBrizzi as members of the defendant's crew (Tr. at 613, 615, 641). He testified that the defendant was involved in running the Connecticut faction of the Family through Tony Megale (Tr. at 644) who he saw at the Ravenite a few times with the defendant and Giuseppe Gambino. (Tr. at 645). That faction was involved in gambling, loansharking and labor racketeering. (Tr. at 645).

He never saw Megale turn in any money to any member of the Gambino family and if Megale ever did, Gravano didn't know to whom. (Tr. at 647-48). In accordance with Family protocol, each captain, including the defendant, contributed $3,000 as a Christmas present for John Gotti. (Tr. at 648). Gravano never received any money from Giuseppe Gambino in connection with Connecticut gambling or loansharking and did not know whether Giuseppe Gambino was involved in any way in those Connecticut activities. (Tr. at 648-49).

After the arrest and indictment of Tony Megale, he discussed pleading guilty with the defendant, who then presented that possibility to Gotti. Gotti's permission to plead guilty was transmitted to Megale through the defendant. (Tr. at 651-52).

Cross-examination elicited from Gravano that Gotti never discussed with him the receipt of monies from Connecticut and never told him he was receiving money from Giuseppe Gambino (Tr. at 676-77, 680); that Gravano never received money from Giuseppe Gambino (Tr. at 679); that Gotti never told him that the defendant or Giuseppe Gambino was to bring in a specified weekly sum from Connecticut gambling and loansharking (Tr. at 680-81, 684-85); that neither Angelo Ruggiero nor Joe Piney ever told him (Gravano) that the defendant or Giuseppe Gambino ever delivered money to John Gotti from Connecticut gambling and money lending. (Tr. at 682).

Counsel then embarked upon a course of a vigorous, aggressive and methodical impeachment in which virtually every crime and every wrongful act committed by the witness was minutely dissected and laid before the jury over a period of two days and approximately 150 pages of transcript. Included in that cross-examination was the fact that at a time when Gravano had previously testified he met with the defendant in New York concerning the Megale plea, he was,

in fact, on vacation in Puerto Rico. (Tr. at 838-44). The redirect and recross-examination of this witness added little of substantive value to what has been outlined above.

Joseph L. Sheridan, a Special Agent of the FBI, testified as to the significance of terms used and the identity of persons referred to during a tape-recorded conversation between William Lepore, a confidential informant who was wired, and Aurelio Carmolingo, an associate of the Gambino Family and a Connecticut loanshark. (Tr. at 897). A person identified by Agent Sheridan as Tommy DeBrizzi, in charge of the Connecticut faction of the Gambino Family, was referred to in that conversation. (Tr. at 904). Also referred to was a person identified by Agent Sheridan as Tony Megale who succeeded Tommy DeBrizzi and who was said to be affiliated with the Gambino Family in New York. (Tr. at 919). Throughout that conversation, references were made to gambling and shylocking activity of Carmolingo and others associated with the Gambino Family. There were no references to either Thomas or Giuseppe Gambino or any of the recorded conversations and Agent Sheridan testified that neither Thomas nor Giuseppe Gambino were seen during the course of surveillances. (Tr. at 941).

Michael Sairius, a retired Connecticut State Police detective, testified as an expert on gambling. He explained the meaning of gambling terms used during the course of telephone conversations between a bookmaking establishment and bettors; the mechanics of bookmaking; and the fact that Tony Megale's voice was intercepted on some of those recorded conversations. (Tr. at 1072).

That there was a relationship between Tommy DeBrizzi, Tony Megale, Frank Piccolo (DeBrizzi's predecessor in charge of the Connecticut faction of the Gambino Family) and others and John Gotti was established

through the testimony of FBI Special Agents Paul Hayes, Jr., and John Schiman. (Tr. at 1073-85).

Special Agent Eugene McCarthy testified to surveilling Tony Megale on March 22, 1989 from Stamford, Connecticut, to the Cafe Cappuccino on Morris Avenue in the Bronx, to the Dynamic Delivery Corporation warehouse on West 24th Street in Manhattan. (Tr. at 1087-89). The Cafe Cappuccino was the place where Phil Loscalzo "did most of his business ... almost on a daily basis." (Tr. at 1175). The defendant Thomas Gambino had an interest in the Dynamic Delivery Corporation. (Tr. at 1176). Cross-examination elicited that during the course of that surveillance Agent McCarthy did not see Giuseppe Gambino.

FBI Special Agent James Riordan testified that while on surveillance on November 14, 1985 he saw Thomas DeBrizzi meet with Tony Megale and Phil Loscalzo in Stamford, Connecticut and did not see Thomas Gambino or Giuseppe Gambino during the course of that surveillance. (Tr. at 1093-97).

FBI Special Agent George Mueller testified that while on surveillance on January 22, 1986, he observed Tommy DeBrizzi emerge from a cafe with Giuseppe Gambino on Morris Park Avenue in the Bronx and enter the premises at 1803 Bogart Avenue which was within walking distance from the cafe. (Tr. at 1100). Approximately two hours later, DeBrizzi was observed leaving 1803 Bogard Avenue and approximately twenty minutes after that Thomas Gambino and Phil Loscalzo were seen leaving the Bogart Avenue address. (Tr. at 1102-03). Photographs of the persons mentioned were taken on that occasion and received in evidence as GX 902A-H. On March 22, 1989, approximately three years later, Agent Mueller testified that he surveilled Tony Megale from Stamford, Connecticut to the Cafe Cappuccino in the Bronx where he photographed Tony Megale with Phil Loscalzo and

then followed Tony Megale to a point near Dynamic Delivery in Manhattan. (Tr. at 1105-07).

FBI Special Agent Milo Dowling, the Case Agent for this case, testified on behalf of the government. He testified that on May 3, 1989 he followed Tony Megale from Cos Cob, Connecticut to West 35th Street in Manhattan and together with others, executed a search warrant authorizing a search of Megale and his vehicle. Agent Dowling also described the articles found on Megale's person. (Tr. at 1153-55). Agent Dowling then testified to specific dates and to events occurring on those dates which were of more than passing relevance to the government's theory of the case and to the entire mosaic of evidence with which these isolated pieces of testimony fit. For example, Thomas Gambino was observed at the Ravenite Social Club on April 17, 1990, the day on which Tony Megale pleaded guilty in the federal court in Connecticut. (Tr. at 1159). Between April 17 and April 21, 1990 (the date on which John Gotti, Jr. was married), there were no observations of Thomas Gambino at the Ravenite. He was next observed there on April 24 and again on April 26 and 27. (Tr. at 1160-61). This was the only week in three years of video surveillance in which Thomas Gambino was seen at the Ravenite on three separate days. (Tr. at 1168). Tony Megale had moved to withdraw his plea on April 25 and his motion was denied on April 30. (Tr. at 1161). The particular significance of the foregoing is that Gravano had previously testified that he met with Gotti and Thomas Gambino regarding the Megale plea at the Ravenite on April 18 which was questionable given the absence of an observation of Thomas Gambino at the Ravenite between April 17 and April 21. Agent Dowling became aware of the discrepancy while compiling a summary chart based upon videotaped surveillance depicting persons seen at the Ravenite on given dates. (Tr. at 1163). He never called the discrepancy to the attention of Gravano and to his knowledge, Gravano himself first became aware of the discrepancy when

confronted with it upon cross-examination by the defendant's counsel. (Tr. at 1164). It is also particularly significant to note that the summary chart from which the discrepancy became apparent was provided to the defense approximately one week prior to the commencement of the trial. (Tr. at 1163).

Another summary chart reflecting telephone records of Anthony Megale for the years 1985-1990 was received in evidence. (Tr. 172-73). Agent Dowling testified that those records revealed a number of calls to the residence of Giuseppe Gambino; to and from the Romeo Cafe in the Bronx where Giuseppe Gambino was frequently found; to the residence of Phil Loscalzo; to and from the Cafe Cappuccino in the Bronx where Loscalzo was frequently found; to Consolidated Carriers on West 35th Street in Manhattan, a company in which Thomas Gambino has an interest (Tr. at 1173-76, 1181); calls billed to Megale's home from a grocery store three doors removed from the Ravenite Social Club on days when Megale was also observed at that club (Tr. at 1179-80); calls from Bridgeport, Connecticut to the office of Paul Victor, Megale's lawyer in New York City and to Consolidated Carriers on April 23, 1990, the day on which the transcript of Megale's guilty plea was filed (Tr. at 1182-84); calls from Stamford, Connecticut to Paul Victor and to Consolidated Carriers on April 30, 1990, the day on which Megale's motion to withdraw his plea was filed.

Videotaped surveillances of the Ravenite Club were received in evidence and played. Agent Dowling identified the persons captured on those videotapes. (Tr. 1189-1213). Reference will be made to a selected few of the events depicted. On October 27, 1988 the defendant and Gravano leave the Ravenite and engage in conversation for approximately thirty-five minutes. (Tr. at 1192). On the day Tony Megale pleaded guilty, Thomas Gambino arrived at the Ravenite and was seen later on leaving with John Gotti and

others. (Tr. at 1203). On April 24, 1990, the day before Megale filed his motion to withdraw his plea, Thomas Gambino and Gravano enter the Ravenite and thereafter Gambino is seen leaving with John Gotti. (Tr. at 1205). On April 26, 1990, the day after the motion to withdraw the plea is filed, Thomas Gambino, Gotti and Gravano are again captured in a walk-talk. On May 3, 1990, after Megale's motion to withdraw his plea was denied, Thomas Gambino and John Gotti are shown again walking and talking. Shortly thereafter, Thomas Gambino is again walking and talking with one Vinnie Aloi, described as a member of the Colombo Organized Crime Family. Giuseppe Gambino is also at the Ravenite on that day conversing with Thomas Gambino and Frank Locascio outside the Ravenite Club. (Tr. at 1210-11). On May 10, 1990, the videotape depicts Giuseppe Gambino and Tony Megale entering and exiting the Ravenite Club and on May 14, Thomas Gambino is shown exiting the Club with John Gotti. (Tr. at 1212).

Counsel for Thomas Gambino cross-examined Agent Dowling about the inconsistency concerning the date on which Gravano showed Thomas Gambino a newspaper article reporting the guilty plea of Tony Megale and discussing that plea with him. (Tr. at 1218-24, 1265-66). Cross-examination also elicited that Tony Megale was at the Ravenite Club on many occasions when Thomas Gambino was not observed there. (Tr. 1228-34). Cross-examination also elicited the many phone calls Tony Megale made from his cousin's restaurant located a few blocks from the Ravenite Club. (Tr. at 1251-58). Agent Dowling testified, in response to questions put to him on cross-examination, that he did not have a recorded conversation in which Tommy Gambino was discussing Connecticut gambling with Tony Megale or in which he is heard directing Megale to come to New York. (Tr. at 1262).

Agent Dowling was cross-examined vigorously, as well, by counsel for Giuseppe Gambino concerning the date of the discussion between Gravano and Thomas Gambino about the newspaper article reporting the guilty plea of Tony Megale. (Tr. at 1267-77). That cross-examination elicited that Agent Dowling had no knowledge that Giuseppe Gambino was present in the Romeo Cafe on the occasions when Agent Dowling testified telephone calls were made from that Cafe to Tony Megale (Tr. at 1283), nor did Agent Dowling know whether the telephone calls from Tony Megale's telephone to Giuseppe Gambino's telephone were between Mrs. Megale and Mrs. Gambino. (Tr. at 1282). Agent Dowling never saw Tony Megale deliver anything to Giuseppe Gambino nor did he ever see Giuseppe Gambino deliver anything to Salvatore Gravano. (Tr. at 1285).

This detailed account, assessed objectively, belies the dogmatic assertion that the case stood or fell upon the credibility of Salvatore Gravano and that it was his credibility which alone accounted for the defendant's conviction and his co-defendant's acquittal. Gravano's direct testimony explicitly linking the defendant to the Connecticut faction of the Gambino Family was only as follows:

Q. After DeBrizzi was killed, who took over management of the Connecticut faction?

A. When Tommy Gambino was involved in running the Connecticut faction, there was Tony Megale who basically took direct control of it in answer to Tommy Gambino.

(Tr. at 643-44)

Beyond that, Gravano's only testimony linking the defendant to the Connecticut faction is reflected in this snippet of direct and re-direct testimony:

Q. Did Tony Megale subsequently plead guilty?

A. Yes, he did.

Q. What happened as a result of Tony Megale's plea?

A. It was in the papers that he admitted being a made member, that he was controlling the Gambino interest in Connecticut.

We found out. John Gotti and myself were sitting there. I believe Frank Locascio came in, who was our acting consigliere, with the newspaper, put it on the table. John read it, handed it over to me. I read it and shortly after that, Tommy Gambino came in and told us that he read the article. We gave him the article. He said he read it. He said if it was so, which he didn't believe it to be so, he would make him withdraw the plea.

Q. That Thomas Gambino would make Tony Megale withdraw the plea?

A. Yes.

Q. What happened next?

A. He tried to withdraw the plea.

(Tr. at 652).

On redirect examination:

Q. For several years prior to Tony Megale, Tommy Gambino was also responsible for the operation in Connecticut, is that fair to say?

A. Yes.

(Tr. at 865-66).

As has been previously outlined, that recounted event was the subject of much inquiry which established that it did not occur on the date testified to by Gravano, but, nevertheless permitted the jury to find that he was mistaken as to the date but not as to the occurrence. (Tr. at 1290-91). Gravano's direct testimony pertaining to Joe Gambino in this connection is reflected in the transcript as follows:

Q. Do you know *whether or not he* [Joe Gambino] was involved in any way in the Connecticut gambling and loansharking operation?

* * * * * *

A. No.

(Tr. at 648-49) (emphasis added).

A plain reading of the few lines can only be understood as conveying that Salvatore Gravano did not know whether Joe Gambino *was or was not* involved in Connecticut gambling and loansharking.

Those few lines from a transcript of approximately 1700 pages represent the direct testimony of Gravano linking the defendant to the Connecticut faction of the Gambino Family. He disclaimed any knowledge of any of the details of that

linkage as his cross-examination made clear and as is reflected in the following salient portions:

Q. Did John Gotti ever send a message to you and say to you, you know, Sammy, Joe Gambino is someone who is supposed to bring down $1600 a week from Connecticut gambling and money lending? Never said that in any message to you, correct?

A. Correct.

Q. And he never said that to you in any message with respect to Tom Gambino?

A. As far as Connecticut gambling?

Q. That's what we are talking about, Connecticut gambling, Connecticut money lending, do you understand that, that's the only thing I'm asking you about.

Did John Gotti ever say to you, by way of any message sent from the prison while you ran the family, that Tom Gambino was to bring down $1600 a week from Connecticut gambling and money lending?

A. No.

* * * * * *

Q. If I got it, then I say to you, sir, during the period of time that you ran this family, the man in charge, am I correct, when I say neither John Gotti nor any single person ever said to you that Joe Gambino or Tom Gambino was responsible, was assigned the responsibility of bringing money from Connecticut gambling and Connecticut money lending, correct, Mr. Gravano?

A. Not to me, no.

Q. So, I am correct, am I not, that no one ever said that to you, the man in charge, whether it be Gotti or any other of these--I think it's been described as 250 made people and a thousand associates, so 1250 people plus Mr. Gotti, that's 1251 people, no one ever said that to you?

A. I don't talk to 1251 people.

Q. Whoever you spoke to?

A. The committee we ran the family with didn't speak to me about it.

Q. Nobody said it, right?

A. Not the committee, no.

Q. Let me ask something. Part of the people who comprised the trio who ran the family during Mr. Gotti's absence, was not only yourself, but I have averted [sic] to the name Joe Piney, correct, he was a member?

A. Yes.

Q. Of this commission, what is it called?

A. The Committee.

Q. The Committee. And Angelo Ruggiero was a member of the Committee.

Is that right?

A. Yes.

Q. Am I correct when I say that neither Angelo Ruggiero or Joe Piney ever said to you, Sammy, we are supposed to get $1600 a week from Connecticut gambling and money lending; am I correct?

A. No one ever told me that.

Q. And in fact neither Joe Piney nor Angelo Ruggiero ever said to you that my client, Joe Gambino, or Tom Gambino, had ever in their lifetime delivered any monies to John Gotti from Connecticut gambling and Connecticut money lending, specific crimes charged here?

A. I was never told that, no.

(Tr. at 680-83).

The defendant's assertion that were it not for those brief exchanges, he would not have been convicted ignores a mass of other evidence which would have compelled a denial of a motion pursuant to Rule 29 of the Federal Rules of Criminal Procedure even if Gravano had not testified at all. The tape recorded conversation between John Gotti and George Remini on January 17, 1986 which the jury heard and about which Agent Gabriel testified confirmed the defendant's status as a Captain in the Gambino Family out of the mouth of John Gotti as did the tape recorded conversations of January 4, 1990 and January 17, 1990 which also identified members of the defendant's crew. The tape recorded conversation between John Gotti and the defendant on December 19, 1989 about which Agent Gabriel testified confirmed the assumption by the defendant of responsibility for Tony Megale's legal fees. The frequency with which the defendant was videotaped at the Ravenite Club and the walk-talks he had with John Gotti and Salvatore Gravano; the surveillance of Megale in the area of Dynamic Delivery and Consolidated Carriers, in each of which the defendant had an interest; phone calls from

Megale to Consolidated Carriers; the phone call from Consolidated Carriers to the hotel adjacent to the federal courthouse in Bridgeport, Connecticut on the day on which Megale's plea of guilty was filed and a mass of similar circumstantial evidence from which inculpatory inferences could have been and obviously were drawn, sufficed to explain the jury's verdict of guilt as to the defendant. The defendant's assertion that the outcome of this case rested upon the jury's acceptance of Gravano's testimony about a meeting he had with the defendant to discuss Tony Megale's guilty plea is hardly persuasive for a variety of reasons. First, as has already been stated, the evidence of the defendant's guilt absent Gravano's testimony was more than sufficient to justify the jury's verdict. Second, the jury had ample bases to conclude that Gravano did in fact meet with the defendant as he testified but was mistaken as to the date of that meeting. Third, the vigorous, extensive and impeachment cross-examination of Gravano, by skilled counsel, placed his credibility squarely before the jury. Indeed, in the Defendant's Memorandum, at page 6, he concedes "[d]espite vigorous cross-examination, they found him credible...." It is interesting to note that in his summation, counsel for Giuseppe Gambino urged upon the jury Gravano's credibility in disclaiming any knowledge about his client's involvement in Connecticut gambling and loansharking.

He argued to the jury as follows:

Will you please favor me by turning to page 649. It's true Mr. Mearns asked this question, but he knew, Mr. Mearns did, that I would be standing to cross-examine in a moment. And what did Salvatore Gravano say?

Question: Do you know whether or not he, Joe Gambino, who is who Mr. Mearns is talking about, was involved and do you see this modification, do you know whether Joe

Gambino was involved in any way in the Connecticut gambling and loan-sharking operation?[1]

* * * * * *

Joe Gambino was not involved in Connecticut gambling or Connecticut loan-sharking.[2]

Now, whatever one says about Salvatore Gravano it is crystal clear that the role he played was such in this enterprise if Joe Gambino was involved in Connecticut money lending and loan-sharking Salvatore Gravano would know it.

* * * * * *

And between the period May, 1986 to April of 1987, he ran this family. He ran this enterprise. This was an enterprise concerned not with social events this was an enterprise concerned with money, making money, collecting money. Gravano ran the family. He ran the day to date [sic] operations of this family when John Gotti was in jail for one full year. He was part of the administration, the top three people in this family. For a whole year when Gotti was sitting in the can, while he ran the family with two other[s], John Armone, Piney, and Angelo Ruggiero

---

[1] An examination of page 648 of the official transcript of this trial reveals that the question put to Mr. Gravano was as stated above, namely: Q. Do you know *whether or not* he was involved in any way in the Connecticut gambling and loansharking operation? The answer appears on page 649 of that transcript: A. No. There is no "modification" on page 649.

[2] This statement, intended to recite Gravano's response to Mr. Mearns' question, misstates that response as f.n. 1 makes clear.

one of them was in jail, the other one was preparing for a case and Gravano says he was the person in charge.

* * * * * *

He is in a position obviously to know who has responsibility for making money, who has responsibility for delivering money, what the operations of the family are, and what does he tell you? Joe Gambino to his knowledge never had any responsibility with respect to Connecticut gambling and money lending.[3]

I am going to ask you if you will turn to the next series of pages. I am not going to make you or request you read it but from 677 until 684.

In detail, Mr. Gravano was asked, sir, during the five years that you were part of the administration of this family, did anybody, John Gotti, Joe Armone, Angelo Ruggiero, any human being on the face of this earth say, suggest, intimate that Joe Gambino was connected to Connecticut gambling and loan-sharking? And his answer was no.

Did Gotti ever say to you that Joe Gambino had one role to play in Connecticut gambling and loan-sharking? No was his answer.

When Mr. Gotti was in jail, messages were received by you with respect to the collection of monies and the running of the family, was any message received from Mr. Gotti, Mr. Armone or Mr. Ruggiero to the effect Joe Gambino had one solitary role to play in the operation of Connecticut gambling and Connecticut loan-sharking? And the answer was no.

---

[3] *See, supra*, as regards the inaccuracy of this statement.

Does this man know, Gravano, about the affairs of Connecticut gambling, and Connecticut loan-sharking? Not only as I say was he a part of the administration for five years, but he and he alone pleaded guilty to supervising, managing, directing, and controlling Connecticut gambling and Connecticut loan-sharking.

Do you understand how important that is?

* * * * * *

He pleaded guilty on December 5, 1991 in this courtroom to supervising, managing, directing, controlling, financing Connecticut gambling and Connecticut money lending. Who better than Salvatore Gravano would know who was or was not involved in an enterprise, specific criminal act that he had pleaded guilty to, that he was involved in? And yet he said, Joe Gambino was not involved.[4]

That is a very, very difficult burden for this government to overcome.

Really, when that happened, it would be like the floor of an elevator coming out. I mean, think about it. The man who ran the family and was in charge of Connecticut gambling and money lending tells you ladies and gentlemen of the jury to your face, Joe Gambino had no role to play in it. He was not involved quote in any way close quote in Connecticut gambling.

What more do you want?

* * * * * *

---

[4] See f.n. 3, *supra.*

> Not to burden you by having to read once again Gravano testimony, Gravano has maintained from day one that Joe Gambino was not involved quote in any way in Connecticut gambling and money lending.[5]
>
> Tr. at 1540-47.

It would be idle to speculate as to the reasons for the acquittal of his co-defendant. Surely, to ascribe that result entirely to Gravano's ignorance as to "whether or not" the co-defendant was involved, is sheer sophistry. Suffice it to say that the references to him on intercepted conversations which were, for the most part, oblique, and the fleeting glimpses of him captured on videotape and photographs were *de minimis* in comparison to those of the defendant.

II

A consideration of the bases for the motion for a new trial pursuant to Rule 33, Fed.R.Crim.P., and the legal principles which must inform the determination of that motion will follow. At the outset it is important to note that the alleged perjury of Gravano is not claimed to have occurred during this trial. Rather, the defendant's assertion is predicated upon testimony given by Gravano in another criminal case tried in the Southern District of New York and upon a letter dated May 12, 1993 written by an Assistant United States Attorney in yet another criminal case pending in this court. In essence, the defendant claims that Gravano testified inconsistently about his own involvement in narcotics, and that the government was aware of that inconsistency and failed to disclose it to the defendant, thus depriving him of impeachment material. The reliance by the defendant upon cases such as *United States v. Wallach*, 935 F.2d 445 (2d

---

[5] Ibid.

Cir.1991) *on remand*, 788 F.Supp. 739 (S.D.N.Y.), *aff'd*, 979 F.2d 912 (2d Cir.1992), *cert. denied*, --- U.S. ----, 113 S.Ct. 2414, 124 L.Ed.2d 637 (1993); *United States v. Stofsky*, 527 F.2d 237 (2d Cir.1975), *cert. denied*, 429 U.S. 819, 97 S.Ct. 65, 50 L.Ed.2d 80 (1976) and *United States v. Seijo*, 514 F.2d 1357 (2d Cir.1975), *appeal after remand*, 537 F.2d 694 (2d Cir.1976), *cert. denied*, 429 U.S. 1043, 97 S.Ct. 745, 50 L.Ed.2d 756 (1977), is misplaced. Those cases addressed the appropriate remedial response where a principal government witness commits perjury during the course of the trial. That is not this case. The defendant here seeks this court's remedial response to impeachment material he claims the government withheld. That response is informed by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and its progeny.

An analysis of the issue will then begin with Brady. Brady testified on his own behalf at trial. He admitted his participation in the murder for which he was indicted but claimed that a co-defendant, Boblet, did the actual killing. He requested the jury to return a verdict against him "without capital punishment." After Brady was convicted and sentenced to death, he was made aware of an admission by Boblet that he, Boblet, did the actual killing. *Id.* at 84, 83 S.Ct. at 1195. That admission was withheld from Brady by the prosecution. Brady's new trial motion was granted, but restricted to the question of punishment, guilt not being in issue. *Id.* at 84, 83 S.Ct. at 1195. The Court held that the suppression of evidence which, if made available to the defendant would tend to exculpate him or reduce the penalty, violates due process irrespective of the good faith or bad faith of the prosecution. *Id.* at 87, 83 S.Ct. at 1196. The distinction between this case and Brady needs no explication beyond simply stating that evidence which would exculpate this defendant was not withheld.

The next case of significance was *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), in which the government failed to disclose an alleged promise to its key witness that he would not be prosecuted if he testified for the government. The key witness was Giglio's alleged co-conspirator *and the only witness linking Giglio with the crime*. In holding that Giglio was entitled to a new trial, the Court wrote:

> When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within [the Brady rule].... We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict...." A finding of materiality of the evidence is required under Brady .... A new trial is required if "the false testimony could ... in any reasonable likelihood have affected the judgment of the jury...."

Id. at 154, 92 S.Ct. at 766 (cites omitted). The Court went on to note that the government's case "depended almost entirely on [the witness's] testimony; *without it there could have been no indictment and no evidence to carry the case to the jury.*" *Id.* (emphasis added). That is not this case. The government's case was not at all dependent entirely on Gravano's testimony, as the review of the record described above plainly reveals. It is also important to recall that this defendant was initially indicted together with Gravano, Gotti and Locascio. He was severed from that indictment and the superseding indictment on which he was tried and convicted charges him with essentially the same crimes.

In *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the defendant was convicted of

second-degree murder. The victim died of multiple stab wounds. At the trial, the defendant argued that she acted in self defense. The prosecutor failed to disclose the victim's prior criminal record which reflected two prior convictions of assault and carrying a deadly weapon which, in each case, was a knife. The question presented was whether the failure to provide that information which would have tended to support the defendant's self-defense argument deprived the defendant of a fair trial under Brady. The Court held that it did not.

There is much that is instructive in Agurs and bears repetition in some detail. To begin, the Court believed it critical to reiterate that a prosecutor does not violate a constitutional duty of disclosure unless that which has not been disclosed is sufficiently significant to deprive the defendant of a fair trial. Information which has not been disclosed does not become "sufficiently significant" or "material" in a constitutional sense because there is a mere possibility that the undisclosed information "might have helped the defense, or might have affected the outcome of the trial.... Nor do we believe the constitutional obligation [of disclosure] is measured by the moral culpability, or the willfulness, of the prosecutor.... If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Id.* at 108-10, 96 S.Ct. at 2395. Continuing, the Court wrote:

> ... [S]ince we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel, we cannot consistently treat every nondisclosure as though it were error. It necessarily follows that the judge should not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless-error standard. Under that standard when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his conviction is sure that the error did not influence

> the jury or had but very slight effect.... Unless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant.
>
> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Id. at 111-13, 96 S.Ct. at 2401-02.

Applying that standard, the Court concluded that after reviewing the nondisclosure "in the context of the entire record the trial judge remained convinced of respondent's guilt beyond a reasonable doubt, and since we are satisfied that his firsthand appraisal of the record was thorough and entirely reasonable, we hold that the prosecutor's failure to tender [the victim's] record to the defense did not deprive respondent of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment." *Id.* at 114, 96 S.Ct. at 2402.

The defendant places great reliance on *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). As is not infrequently the case, the essence of a

decision cannot be divorced from the factual setting in which it is crafted. Bagley was indicted on fifteen counts of violating federal narcotics and firearms statutes. The government's *only witnesses*[6] were state law enforcement officers employed as private security guards for a railroad who assisted the federal Bureau of Alcohol, Tobacco and Firearms ("BATF") in an undercover investigation of Bagley. The defendant sought pretrial discovery of any "deals, promises or inducements" made to those witnesses. *Id.* at 670-72, 105 S.Ct. at 3377-78. Among the material supplied in response to that discovery request and pursuant to the Jencks Act, the government produced a series of affidavits executed by those witnesses in which they stated they received no rewards or promises of reward. Following Bagley's conviction, he learned that BATF had contracted to purchase information from the witnesses about crimes committed by Bagley "and upon the accomplishment of the objective sought to be obtained by the use of such information to the satisfaction of [the government] will pay ... a sum commensurate with services and information rendered." *Id.* at 671, 105 S.Ct. at 3378. Each witness was subsequently paid $300. Bagley then moved to vacate his sentence pursuant to 28 U.S.C. Sec. 2255 alleging the government's failure to disclose the contracts which could have been used to impeach the witnesses violated his right to due process under Brady. *Id.* The Court of Appeals for the Ninth Circuit held "that the government's failure to provide requested Brady information to Bagley so that he could effectively cross-examine two important government witnesses requires an automatic reversal." *Id.* at 674, 105 S.Ct. at 3379 (quoting *Bagley v. Lumpkin*, 719 F.2d 1462, 1464 (9th Cir.1983)). That holding was reversed. Although the evidence was used by the defense to impeach the government's witnesses by

---

[6] See the dissenting opinion by Justices Marshall and Brennan in *Bagley*, 473 U.S. at 685-709, 105 S.Ct. at 3385-97.

showing bias or interest, rather than evidence which was exculpatory as in *Brady* and *Agurs*, the Court held that the *Brady* rule embraced impeachment evidence as well as exculpatory evidence. Reiterating the holding in *Agurs* that "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial," the Court said that "[i]t remains to determine the standard of materiality applicable to the nondisclosed evidence at issue in this case." *Id.* 473 U.S. at 678, 105 S.Ct. at 3381. That determination was made as follows:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Id. at 682, 105 S.Ct. at 3383.

It is of more than slight significance to note that unlike *Giglio* and *Bagley,* in which impeachment evidence of the *only* government witnesses was not disclosed, Gravano was one of many witnesses (excluding audio and video evidence) and his testimony implicating the defendant consisted of less than a dozen lines in a transcript of approximately 1700 pages. In that crucial respect the cases are plainly distinguishable. Applying the standard of *Bagley*, and upon a review of the entire record, I am driven to conclude that there is no reasonable probability sufficient to undermine confidence in the outcome, that had the evidence been disclosed the result of the proceeding would have been different.

That conclusion makes it superfluous, perhaps, to reemphasize the surgical precision with which Gravano's plea

agreement with the government and his criminal past were dissected and laid before the jury on cross-examination--a criminal past which included nineteen murders, labor racketeering, extortion, shylocking, obstruction of justice and gambling. The significance of that vigorous attack with a view towards utterly impeaching him is illustrated in many cases of which *United States v. Gilbert*, 668 F.2d 94 (2d Cir.1981), *cert. denied*, 456 U.S. 946, 102 S.Ct. 2014, 72 L.Ed.2d 469 (1982) and *United States v. White*, 972 F.2d 16 (2d Cir.), *cert. denied*, --- U.S. ----, 113 S.Ct. 669, 121 L.Ed.2d 593 (1992) are peculiarly apt.

In Gilbert, the defendant appealed from a denial of his motion for a new trial pursuant to Rule 33, Fed.R.Crim.P., after information impeaching one Couri, a government witness, became known. After reciting the oft-stated principles that such motions are not favored and that the new evidence must be such as to probably lead to an acquittal, the court wrote, at page 96:

> Couri's credibility had already been attacked at trial. Cross-examination had probed his plea agreement with the Government by which he had been permitted to plead guilty.... He was also shown to have submitted a false affidavit to a state court in unrelated civil litigation. The new evidence of his misdeeds ... was merely "*additional* evidence tending *further* to impeach the credibility of a witness whose character had already been shown to be questionable," *United States v. Rosner*, 516 F.2d 269, 273-74 (2d Cir.1975), *cert. denied*, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976) (emphasis in original); it could hardly have transformed the jury's image of Couri from paragon to knave.

In *White*, the defendant appealed from the denial of his motion pursuant to Rule 33 for a new trial based on the

ground of newly discovered evidence that the government's *key* witness perjured himself. In affirming the denial of his motion, the court said:

> ... [C]onsideration must also be given to whether the newly discovered evidence is cumulative, that is simply additional evidence to that which was presented at trial as to a fact, or unique evidence that tends to prove a fact at issue.... The evidence questioning the general credibility of Harry Smith was clearly cumulative. As recited by the district court:
>
> > Smith was aggressively cross-examined by the defendant's lawyer, who relentlessly attacked Smith's credibility, called him a liar, and emphasized his lack of veracity in the past. He was shown to be a drug abuser, a narcotics profiteer in the $1 million range, and a convicted felon looking for a way to avoid a long prison sentence.
>
> Since Mincey's testimony would have been admissible only for the purpose of showing that Smith lied about his drug use, *a collateral fact that would simply affect the general credibility of Smith and was not evidence that he was lying as to a particular fact about the crime,* the evidence was cumulative to other evidence of collateral matters that focused on his credibility.

972 F.2d at 21 (emphasis added) (cites omitted).

The defendant also relies for support for his motion upon cases decided by the United States Court of Appeals for the Second Circuit to which I now turn. Chief among them is *United States v. Wallach*, 935 F.2d 445 (2d Cir.1991), *on remand*, 788 F.Supp. 739 (S.D.N.Y.), *aff'd*, 979 F.2d 912 (2d Cir.1992), *cert. denied*, --- U.S. ----, 113 S.Ct. 2414, 124

L.Ed.2d 637 (1993). The opening sentence of the opinion in that case, without more, serves to establish that Wallach is inapposite. That sentence reads: "[t]his appeal presents several questions, the dispositive one being whether the *perjured testimony of a key government witness* requires a reversal of the convictions." *Id.* at 449 (emphasis added). The painstakingly detailed review of the evidence in this case which is set out as pages 3-25 of this opinion can leave no doubt that Gravano was *not* the key government witness here nor was the allegedly perjured testimony given here. Wallach is also distinguishable in that Guariglia, one of the two witnesses upon whose testimony "the prosecution built its entire case" and whose "testimony was, to say the least, critical to the government ... perjured himself during the course of his testimony at trial." *Id.* at 455. Indeed, "Guariglia was the centerpiece of the government's case." *Id.* at 457. The perjury allegedly committed by Gravano was not during the course of this trial. Indeed, not a single question was put to him on this trial regarding the subject about which he claimed to have perjured himself. The focus of Wallach, namely, "[w]hether the introduction of perjured testimony requires a new trial depends on the materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury", *Id.* at 456, is not relevant here. The testimony of Gravano alleged to be perjured was *not* introduced at this trial.

United States v. Seijo, 514 F.2d 1357 (2d Cir.1975), *appeal after remand*, 537 F.2d 694 (2d Cir.1976), *cert. denied*, 429 U.S. 1043, 97 S.Ct. 745, 50 L.Ed.2d 756 (1977) also relied upon by the defendant, is also plainly distinguishable in that, "[t]he essence of the Government's case against both appellants resides in the testimony of Leonard Torres," *id.* at 1358, and it was during the course of his testimony at trial, that he lied. Similarly, in *United States v. Stofsky*, 527 F.2d 237 (2d Cir.1975), *cert. denied*, 429 U.S. 819, 97 S.Ct. 65, 50

L.Ed.2d 80 (1976), the government *relied principally* on the testimony of one Jack Glasser who committed perjury at trial. Even if those vital distinctions were not enough to differentiate those cases from this one, the teachings of *Brady, Giglio, Agurs* and *Bagley* discussed above would compel the conclusion heretofore reached. The corroboration of the few lines of Gravano's testimony from the mouths of John Gotti and this defendant as captured on tape recordings of intercepted conversations and the extensive circumstantial evidence would also distinguish such cases as *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), *United States v. Seijo*, 514 F.2d 1357 (2d Cir.1975), and *United States v. Sperling*, 506 F.2d 1323 (2d Cir.1974), *cert. denied*, 420 U.S. 962, 95 S.Ct. 1351, 43 L.Ed.2d 439 (1975), "where the witness whose credibility was at issue supplied the only evidence linking the defendant(s) to the crime." *See United States v. Petrillo*, 821 F.2d 85, 90 (2d Cir.1987).

If I were more mindful of Francis Bacon's admonition that "an overspeaking judge is no well-tuned cymbal"[7] and wise enough to heed it, I would say no more. Being neither sufficiently wise nor obedient, I venture to make some additional observations. The vigorous and insistent assertions by the defendant of Gravano's perjury *qua* perjury in another case have neither been challenged nor otherwise commented upon to any extent. In calling attention to portions of the opinion in *United States v. Bortnovsky*, 879 F.2d 30, 33 (2d Cir.1989), it is not my intention to challenge or pass upon those assertions in any way. It is interesting to note, however, that in commenting upon a claim that the testimony of a government witness was "palpably false" because he failed to note the substance of that testimony in reports of his investigation or in earlier testimony, the court wrote:

---

[7] Francis Bacon, *Judicature* in *Essays* (J.M. Dent & Sons) 162-63 (1958).

> Powell's earlier silence provides an insufficient basis upon which to find that the later testimony was false. At most, Powell's testimony differed from, but did not contradict, what he said earlier. However, even if this testimony had conflicted directly with that given previously, the difference alone would not constitute perjury. "Presentation of a witness who recants or contradicts his prior testimony is not to be confused with ... perjury." It was for the jury to decide whether or not to credit the witness. *United States v. Holladay*, 566 F.2d 1018, 1019 (5th Cir.) (per curiam), *cert. denied*, 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978). *See also United States v. Hemmer*, 729 F.2d 10, 17 (1st Cir.) (inconsistencies between witness's statements before grand jury and at trial do not warrant inference that government knowingly used false testimony), *cert. denied*, 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984); *United States ex rel. Burnett v. Illinois*, 619 F.2d 668, 674 (7th Cir.) ("Contradictory testimony does not constitute perjury.") (footnote omitted), *cert. denied*, 449 U.S. 880, 101 S.Ct. 229, 66 L.Ed.2d 104 (1980).

See also United States v. Sanchez, 969 F.2d 1409, 1415 (2d Cir.1992) (differences in recollection alone do not add up to perjury but present a credibility question for the jury); *United States v. Petrillo*, 821 F.2d 85, 89 (2d Cir. 1987) ("Taken in context, we regard this testimony as, at worst, equivocal ... and not so misleading as to require corrective action by the government.").

In denying that it was insensitive to its constitutional obligations prescribed by *Brady*, the government argues that the defendant does not have a right to search through the government's files, *Bagley*, 473 U.S. at 675, 105 S.Ct. at 3379, and that evidence is not suppressed when the defendant

knew or should have known the essential facts that would permit critical scrutiny of a witness's testimony. *United States v. Zackson*, 6 F.3d 911 (2d Cir.1993); *United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir.) (the government is not required to draw inferences from evidence which defense counsel is in an equal position to draw), *cert. denied*, 482 U.S. 929, 107 S.Ct. 3214, 96 L.Ed.2d 701 (1987); *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir.1982), *cert. denied*, 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983).

In this regard, the defendant had access to, and in fact had, Gravano's prior testimony in *United States v. Gotti; United States v. Pape,* Docket No. 92-CR-0159, EDNY, Feb.1992; *United States v. Orena,* Docket No. 92-CR-0351, EDNY, Apr. 1992. In each of those cases, he was cross-examined about the involvement of John Gotti and the Gambino Organized Crime Family in drugs. In each he testified that the Gambino Family and John Gotti were against drugs. He also testified that there were, however, crews within the Gambino Family nevertheless involved in drug trafficking. It was surely known to the defendant that members of John Gotti's crew, namely, Angelo Ruggiero, Gene Gotti, and John Carniglia were convicted of drug trafficking in this district. (*See* Exhibit C, Def's. Mem.)

In this case, Gravano was cross-examined very skillfully concerning the period of time during which John Gotti was incarcerated and he, Gravano, either alone or with two others, ran the Gambino Family. The thrust of this examination was to establish that as the *de facto* head of the Family, Gravano was aware of all of its activities and having no knowledge of the involvement of the defendants in the crimes charged, they therefore hadn't any. For example:

Q. Am I correct to say that you were the closest person in this operation in the years 1988, '89, 1990 to John Gotti?

A. I would say so. I was the underboss, second in command.

Q. He made you the underboss, isn't that so?

A. Yes.

* * * * * *

Q. Now, sir, there came a point in time when John Gotti was remanded to a jail, i.e., that is, the period May 1986 to April 1987, right?

A. Yes.

Q. And then there was left to this family the business of conducting its business, correct?

A. Yes.

* * * * * *

Q. And during that period of time you were the acting street boss of this family, were you not? A. That's what I was called.

* * * * * *

Q. Is it fair to say that during this period of time you were the person who was in charge of the family, i.e., May '86 to April '87, agreed?

A. Other than John, I guess I was the last word, yes.

Q. But John Gotti was in jail; isn't that right?

A. Yes.

Q. Is it fair, then, to say, considering the people on the street, you were the man in charge of the family while Mr. Gotti was in prison, correct?

A. Yes.

* * * * * *

Q. It is part of this group's business and function to not only provide a social club, but also to make money for its members in the administration; isn't that a fair statement?

A. You got it.

Q. If I got it, then I say to you, sir, during the period of time that you ran this family, the man in charge, am I correct, when I say neither John Gotti nor any single person ever said to you that Joe Gambino or Tom Gambino was responsible, was assigned the responsibility of bringing money from Connecticut gambling and Connecticut money lending, correct, Mr. Granvano?

A. Not to me, no.

* * * * * *

Q. I am correct, am I not, that in your function as underboss, that you had frequent discussions with Mr. Gotti relative to money-making situations; isn't that a fair statement?

A. Social situations.

Q. All right. In other words, when you met with Gotti, you talked about social situations as well as business, the business of this Gambino organized crime family, La Cosa Nostra, correct?

A. Both, yes.

Q. You talked about the various ways that money is generated and made because after all that's its function in part, is it not?

A. Yes, but not necessarily the amounts of money.

* * * * * *

Q. You are a part of the administration, the family, in early '86, until you go to prison on December 11, 1990, some four years or more?

A. Yes.

Q. Correct. During that time you cannot say to this jury, as you look upon them, that John Gotti ever said that Joe Gambino was bringing in or responsible for money from Connecticut gambling and loansharking, correct?

A. Yes.

Q. I am correct?

A. Yes, you are correct.

Q. And do I take it that during the four-year period that you sat at the top of this organization, there were many times that you talked about money and the amount of money that was coming in from the various ventures of this family; isn't that so?

A. We talked about money, but not the amount of money.

Q. You talked about money, right. You talked about people?

A. Yes.

Q. You talked about people who were connected to the money. Is that right?

A. In some cases, yes.

Tr. at 677-85.

It may also be inferred, given the substantial video depictions of the association between Gravano and the defendant, that to apprise the jury of that aspect of Gravano's background would result in spillover prejudice to the defendant which they would have wished to avoid. *See, e.g., United States v. Provenzano*, 615 F.2d 37, 49 (2d Cir.), *cert. denied*, 446 U.S. 953, 100 S.Ct. 2921, 64 L.Ed.2d 810 (1980). The defendant also bases his motion for a new trial upon the failure of the government to produce the notes of FBI Special Agent Carmine Russo of an interview on March 10, 1993 of Salvatore Gravano. Also present at that interview were Assistant United States Attorneys John Gleeson and Andrew Weissmann. It is his view that production of those notes was required by the Jencks Act. The notes are these:

3/10/93

SG/W Gleeson/Weissmann

Pat Conte "capo" big earner w/ Paul C gave Paul C car ME/BE (poss)--gift, drugs Conte John Gambino

C not bringing money into Family JG asked SG to speak to Pat C--off the record if he was dealing drugs Not--mafia war in C would send "Cheech" to Sicily contact SG not know if contact re-est. arrested--JG & Loc

Photos: old man, checked shirt cousin related to Loc in PC's crew made

2. Pat Conte

3. Paul G

4. Cheech "made" Pat's "crew" before JG boss--went to Sicily

5. young man--car Conte's son not made--
They work have jobs

The Jencks Act requires the government to produce any statement of the witness in its possession which relates to the subject matter as to which the witness testified.

The Act defines a "statement" as

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement[.]

* * * * * *

18 U.S.C. Sec. 3500(e).

The initial inquiry is whether the notes of Special Agent Russo contain a "statement" of the witness within the meaning of the Jencks Act. The notes in question are not encompassed by the first clause of the Jencks Act which requires the statement to be written by the witness and signed or otherwise adopted or approved by him. The second clause does not require that the statement be signed or approved by the witness. What is required, however, is that it be a "substantially verbatim" statement by him.

> It is clear from the continuous congressional emphasis on 'substantially verbatim recital,' ... that the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital. Quoting out of context is one of the most frequent and powerful modes of misquotation. We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, *or* which were prepared after the interview without the aid of complete notes, and hence on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions.

Palermo v. United States, 360 U.S. 343, 352-53, 79 S.Ct. 1217, 1224-25, 3 L.Ed.2d 1287 (1959) (emphasis added). Had there been any doubt as to whether production of the Russo notes was compelled by the Jencks Act, the correct procedure would have been to submit the notes to the trial judge for an *in camera* determination. *Palermo*, 360 U.S. at 354, 79 S.Ct. at 1225.

The government did not produce the Russo notes, nor were they submitted for an *in camera* determination. The teaching

of *Palermo* and the standard it prescribed did not require the government to do either. Had the government entertained a doubt regarding production and presented the notes to this court for an *in camera* determination, production would unquestionably not have been required. The notes clearly do not reflect the kind of factual narrative contemplated by the Jencks Act and fall far short of the *Palermo* standard. See also *Hanks v. United States*, 388 F.2d 171 (10th Cir.) (Jencks Act does not compel the indiscriminating production of agent's summaries of interviews regardless of their character or completeness), *cert. denied*, 393 U.S. 863, 89 S.Ct. 144, 21 L.Ed.2d 131 (1968); *United States v. Merida*, 765 F.2d 1205 (5th Cir.1985) (Jencks Act does not require government to release to defense copies of witness interview reports prepared by agents of Drug Enforcement Administration which were short, concise, summaries of witness' version of the facts as recounted to agents, and in which summarization and not verbatim recital was manifest).

Even if the Russo notes satisfied the "statement" requirement of the Act, production would not be required for the reason that the statement does not relate to the subject matter as to which the witness testified. In *United States v. Pacelli*, 491 F.2d 1108 (2d Cir.), the court wrote, at page 1118:

> Under the Jencks Act a defendant in a federal criminal trial is entitled, after a government witness has testified on direct examination, to receive for purposes of cross-examination any "statement" of the witness in the government's possession "which relates to the subject matter as to which the witness has testified." ... We have held that the statement must at least "relate generally to the events and activities testified to" before the statement must be produced, *United States v. Cardillo*, 316 F.2d 606, 615 (2d Cir.), *cert. denied*, 375 U.S. 822, 84 S.Ct. 60, 11

L.Ed.2d 55 (1963), and that the defense is not entitled to statements which are merely "incidental or collateral." *United States v. Birnbaum*, 337 F.2d 490 (2d Cir.1964).

Cert. denied, 419 U.S. 826, 95 S.Ct. 43, 42 L.Ed.2d 49 (1974). The court recognized that the reasoning of *Cardillo* might be too restrictive and that a statement that would support impeachment for bias or interest may relate to the witness's testimony, it also recognized "that not all statements that might in some way be helpful in impeaching the witness are producible." *Birnbaum*, 337 F.2d at 498.

Assuming that the Russo notes were not encompassed by the Jencks Act for the reasons given, but were encompassed by *Brady, et al.*, the previous discussion of the legal consequences that flow from a failure to produce such material would nevertheless lead to the same conclusion, that is, the defendant's motion for a new trial must be denied.

After oral argument on the motion was heard on August 24, 1993 and at which time the court said there would be no further submissions (Tr. at 71), the defendant continued to submit letters to which additional materials were attached in further pursuit of his Rule 33 motion. The first such letter, dated October 6, 1993, states that Michael Rosen, counsel for the defendant, representing a defendant in another case (*United States v. Crea, et al.*, 93-CR-506 (E.D.N.Y.) (SJ)) was furnished a wiretap application dated May, 1989, seeking court authorized interceptions of communications at Salvatore Gravano's business office on Stillwell Avenue in Brooklyn. The affidavit of Kings County Assistant District Attorney Brian Mich in support of that application stated that the electronic surveillance was part of an investigation being conducted by state law enforcement officials and "Agents of the Federal Bureau of Investigation." That application recounts a conversation on March 17, 1989 captured on tape

in which Gravano discusses how a witness subpoenaed to appear before a Grand Jury should testify so as to avoid being prosecuted for perjury or obstruction of justice. The defendant contends that the prosecution was obligated to turn over all Brady material uncovered in that investigation. He relies on this statement in *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972): "The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed for these purposes to the Government. See Restatement (Second) of Agency Sec. 272."

In a letter response dated October 18, 1993, to which an affidavit of Assistant United States Attorney for the Eastern District Laura A. Ward was attached, she swore that "neither the prosecutors in this case nor the other prosecutors in this Office who have worked on related cases were aware of A.D.A. Mich's statement (or the Gravano statement that it recounts) until we received Mr. Burstein's letter." Her affidavit goes on to recite facts pertaining to that wiretap application and the extent of the knowledge her office had. Her subsequent affidavit, dated October 25, 1993, provides even greater detail in that regard.

On October 19, 1993 another letter was received from Michael Rosen, counsel for the defendant, to which were attached three affidavits dated May 5, 1989 and June 8, 1989, respectively: one by Kings County Assistant District Attorney Brian Mich; one by Detective Matthew O'Brien assigned to the Kings County District Attorney's Squad; and one by Kings County Assistant District Attorney Lynn S. Olinger, all in support of an Eavesdropping Warrant requested to be issued by a Justice of the Supreme Court of the State of New York authorizing the interception of communications at the Stillwell Avenue premises. Once again, the defendant urges a *Brady* violation by the government, citing *Giglio*, *Santobello v. New*

York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), and *Wedra v. Thomas*, 671 F.2d 713 (2d Cir.), *cert. denied*, 458 U.S. 1109, 102 S.Ct. 3491, 73 L.Ed.2d 1372 (1982).

On October 25, 1993, counsel for the defendant orally requested an "emergency" meeting with the court. A telephone conference was held shortly thereafter in which the government and defense counsel participated. Immediately prior to that conference, the court was furnished with a copy of an Affirmation in Opposition to a Motion to Bar Retrial, submitted by James B. Comey, a Special Assistant United States Attorney for the Southern District of New York. Various exhibits referred to in that affirmation were not attached and therefore not before the court. The Affirmation was in opposition to a motion made by the defendants in *United States v. Gambino, et al.*, (9S) 88-CR-919 (PKL) in the Southern District of New York. The defendants in that case base their motion on the claim that the Southern District withheld information contained in a letter proffered by the government in the Eastern District in the unrelated case of *United States v. Conte* (CR-93-0085) (ILG) pertaining to the bail status of Conte. The bulk of that affirmation addresses communications between the offices of the United States Attorney for the Southern and Eastern Districts of New York; whether the information exchanged between those offices did or did not make manifest Gravano's discussions with Conte about heroin trafficking and therefore, Gravano's involvement with it; whether the Southern District knew or should have known of that involvement; and whether certain information was or was not Brady material.

The letters of October 6th and 19th will be addressed first. Each is predicated upon the assertion that knowledge of one agent of the Federal Bureau of Investigation working with Assistant District Attorneys of Kings County on another investigation four years ago and knowledge of those Assistant

District Attorneys reflected in wiretap applications to a state judge should be imputed to the Assistant United States Attorneys in this case. That assertion is not persuasive. The three cases upon which the defendant relies will be examined briefly. *United States v. Giglio, supra*, involved a promise of leniency made to the key government witness by one Assistant United States Attorney which was not known to another in the same office. The Court held that the "promise made by one attorney must be attributed, for these purposes, to the Government." 405 U.S. at 154, 92 S.Ct. at 766 (emphasis added.)[8] *Santobello* involved a plea agreement made by one

---

[8] The Court cited in support of that holding The Restatement (Second) of Agency Sec. 272. That Section provides as follows:

> Sec. 272. GENERAL RULE
>
> In accordance with and subject to the rules stated in this Topic, the liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information.

The comments to this section can leave no doubt that the applicability of the general rule has significance for the law of contracts, torts and property. Insofar as the promise made by the Assistant United States Attorney was relied upon by the key government witness in *Giglio*, a contract may be said to have been formed and this Rule was fairly applied. In the context of the facts before the court on this defendant's submission, the applicability of the Rule is extremely doubtful, to say the least, assuming that the Rule was ever contemplated to be applicable to criminal investigations which, I venture to say is also extremely doubtful.

The observation of the Court in *Santobello* confirms the contract analogy, viz.: "... [w]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be

prosecutor which was specifically enforceable against another. In that context, the Court wrote "[t]he *staff lawyers* in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done." *Santobello*, 404 U.S. at 262, 92 S.Ct. at 499 (emphasis added).[9] *Wedra* is inapposite.

To apply *Giglio* to impute the knowledge of an FBI agent and state district attorney to the federal prosecutors in an unrelated case four years later "would appear to stretch the doctrine too far." *See United States v. Rosner*, 516 F.2d 269, 278-79 n. 4 (2d Cir.1975), cert. denied, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976). That imputation presupposes a monolithic view of government which, if adopted, would condemn the prosecution of criminal cases to a state of paralysis. It is undoubtedly accurate to say that investigations of the members and associates of the Gambino Organized Crime Family by many federal and state law enforcement agencies have produced countless hours of surveillance logs and countless hours of video tapes and audio cassettes. Indeed, in the letter of October 6, 1993 previously referred to, defense counsel states his "understanding that the Stillwell Avenue surveillance alone consists of 858 cassettes." In the letter of October 19, 1993 defense counsel writes, "[t]here are still at least 800 tapes to be reviewed to see whether additional *Brady* material was captured and withheld." Those number estimates pertain to the surveillance of just one location.

---

said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello*, 404 U.S. at 262, 92 S.Ct. at 499.

[9] *See* n. 8, *supra*.

To require the prosecutor to listen to every audio cassette, view every video tape and examine every surveillance log of the Gambino Organized Crime Family whenever and by whoever conducted to uncover the possible existence of *Brady* material is neither good logic nor good law and could not have been intended by *Giglio*. The untenability of that contention was most forcefully and convincingly conveyed in *United States v. Quinn*, as follows:

> ... [A]ppellants take the completely untenable position that "knowledge of any part of the government is equivalent to knowledge on the part of this prosecutor" and that "he [the New York prosecutor] must be deemed to have had constructive knowledge of this evidence." ... The Department of Justice alone has thousands of employees in the fifty States of the Union. Add to these many more thousands of employees of "any part of the government." Appellants' argument can be disposed of on a "reductio ad absurdum" basis.

445 F.2d 940, 944 (2d Cir.), *cert. denied*, 404 U.S. 850, 92 S.Ct. 87, 30 L.Ed.2d 90 (1971). *See also United States v. Stassi*, 544 F.2d 579, 582 (2d Cir.1976), *cert. denied*, 430 U.S. 907, 97 S.Ct. 1176, 51 L.Ed.2d 582 (1977) and *United States v. Morell*, 524 F.2d 550, 555 (2d Cir.1975).

Gravano was vigorously cross-examined about his role in obstructing justice. He admitted bribing jurors with a view towards frustrating the successful prosecution of Gambino Organized Crime Family Members, John Gotti and Eddie Lino. Gravano's past intercepted conversation pertaining to testimony before a grand jury was, by comparison, insignificantly cumulative.

The affirmation of James B. Comey is, in the final analysis, irrelevant to the determination of this motion. It

adds nothing to the factual and legal calculus upon which the determination of this motion is based and which has been discussed at some length. Given the emphasis placed upon the conduct of the prosecutors and the recriminations between the Southern and Eastern District Offices of the United States Attorney which one may intuit from the Comey affirmation, it is worth repeating that the constitutional obligation of disclosure is not hinged upon the moral culpability of the prosecutor. If non-disclosure results in constitutional error "it is because of the character of the evidence, not the character of the prosecutor." *United States v. Agurs*, 427 U.S. 97, 110, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976). By adverting to that observation, I do not suggest that the prosecutors in this case were morally culpable and for the reasons previously discussed, I reiterate my conclusion that the character of the evidence did not result in constitutional error by its non-disclosure.

Finally, the defendant's motion for a new trial based upon his assertion that the verdict was against the weight of the evidence is totally devoid of merit. The review of the evidence, set out at length in the first portion of this opinion, would permit no other conclusion.

For the foregoing reasons, the motions are denied.

SO ORDERED.

Appendix C

District Court Decision
Pre-Trial Motions

818 F.Supp. 541 (E.D.N.Y. 1993)

UNITED STATES of America, Plaintiff,
v.
Thomas GAMBINO, Philip Loscalzo and Guiseppe Gambino, Defendants.

No. CR-90-1051 (S-3).
United States District Court,
E.D. New York.

April 15, 1993.

After indictment respecting conducting or participating in conduct of affairs of enterprise through pattern of racketeering activity or collection of unlawful debt and conspiracy to do so, defendants moved to dismiss superseding indictment against defendant, to dismiss count of indictment for improper venue, to strike prejudicial surplusage from indictment, to exclude certain evidence, and to obtain disclosure. The District Court, Glasser, J., held that: (1) four-month delay to prepare superseding indictment joining defendant with two codefendants was excludable under Speedy Trial Act; (2) government would not be compelled to disclose its history of dealing with cooperating witnesses who did not tell truth; and (3) government would not be directed to make available to defendant all its surveillance reports of defendant as exculpatory evidence.

So ordered.

Laura Ward, Geoffrey S. Mearns, Asst. U.S. Attys., for U.S.

Michael Rosen, New York City, for Thomas Gambino.

Judd Burstein, New York City, for Thomas Gambino.

Murray Richman, Bronx, N.Y., for Philip Loscalzo.

Jay Goldberg, New York City, for Guiseppe Gambino.

MEMORANDUM AND ORDER

GLASSER, District Judge:

The defendants, Thomas Gambino, Guiseppe Gambino, and Philip Loscalzo have filed motions which seek to (a) dismiss the superseding indictment against Thomas Gambino; (b) dismiss Count Three of that indictment for improper venue; (c) strike prejudicial surplusage from the indictment; (d) exclude certain evidence; and (e) obtain disclosure.

I

Dismissal of Superseding Indictment Against Thomas Gambino

Thomas Gambino was initially charged in an indictment that was filed on December 12, 1990 with two counts alleging violations of 18 U.S.C. Secs. 1962(c) (RICO) and 1962(d) (RICO conspiracy). The racketeering acts incident to those counts with which he was charged were alleged violations of 18 U.S.C. Secs. 2 and 1955; Sec. 892 and Sec. 894. Pretrial bail and detention hearings followed. On December 12, 1990 an order of excludable delay was entered pursuant to 18 U.S.C. Sec. 3161(h)(8)(B)(ii) based upon a determination that this was a complex case.

A superseding indictment was filed on July 18, 1991. The charges against Thomas Gambino were not altered. On that day several other matters were considered. Mr. Rosen, counsel to Thomas Gambino, advised the court that he would not move for a severance. A trial date of September 23, 1991 was reaffirmed. The motion made by Mr. Rosen on behalf of Gambino for an evidentiary hearing pursuant to *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), was granted, the hearing, if still warranted, to be held at the conclusion of the trial. That motion is, technically, still pending. The disqualification of counsel for then codefendants Gotti and Gravano, and the need that this disqualification created for them to obtain new counsel, caused the September 23, 1991 trial date to be deferred. At a status conference held on August 28, 1991, Mr. Rosen advised the court that his client was required to appear for trial in the state court in January, 1992.

On September 30, 1991 the government, by motion returnable October 3, 1991, sought an order severing the trial of Thomas Gambino. That motion was not opposed and was granted in an order dated October 23, 1991. The trial of codefendants Gotti, Gravano, and Locascio was fixed for January 21, 1992. Gravano pleaded guilty in the interim. The remaining defendants, Gotti and Locascio, were found guilty on all counts on April 2, 1992 and sentenced on June 23, 1992. Post-trial motions were made following the verdict and following sentencing, the last being made as recently as February 3, 1993.

On August 4, 1992 a superseding indictment in which Thomas Gambino was joined with two other defendants was unsealed and filed. This indictment and the indictment originally filed on December 12, 1990, as to Thomas Gambino, are the same except that Gambino was joined with two new defendants and was charged with violating 18 U.S.C. Secs. 1952 and 2 as a predicate racketeering act in Count One

and as a separate offense in Count Three. Thomas Gambino appeared before this court for arraignment on August 14, 1992. A status conference was scheduled for August 21, 1992 at which counsel for all defendants appeared. Mr. Goldberg, counsel for codefendant Guiseppe Gambino, and Mr. Richman, counsel for codefendant Loscalzo, apprised the court of their respective prior engagements and of their need to review approximately 1,000 cassettes; they requested a trial date after the second week of January, 1993. Mr. Rosen joined in their application. (Tr. Aug. 21, 1992, at 4). The government announced its readiness to proceed within seventy days but agreed to abide by the court's direction. When the end of January or the first week of February was suggested as a viable trial date, Mr. Rosen stated as follows:

> MR. ROSEN: I don't want to cry the blues, but I think I have to at least let you know of a potential problem. I don't really see it as a major problem. Perhaps your Honor and Judge Leisure in the Southern District can work it out.
>
> There is a trial scheduled. I don't know if it's a firm date or tentative date because a superseder is about to come down next week or the week after, a case in front of Judge Leisure also called United States of America versus Gambino. It's a similar name from what we have heard. There is a superseder coming down and perhaps the Government can work it out, who goes where first.

February 1, 1993 was then fixed as the trial date in this case, and an order of excludable delay based upon 3161(h)(8)(B)(ii), in which Mr. Rosen concurred (Tr. Aug. 21, 1992, at 6), was issued to cover the period August 21, 1992 to February 1, 1993.

On that same day, August 21, 1992, the government filed a motion to modify the terms of Thomas Gambino's bail. A hearing was held on that motion on September 14, 1992, and it was denied from the bench.

On September 24, 1992 Mr. Rosen filed a motion for a severance on behalf of Thomas Gambino which was returnable on October 2, 1992. That motion was predicated entirely on Mr. Rosen's conflicting trial schedule. On the return date Mr. Rosen stated that "it would be very difficult, indeed, to go to trial in November, but I'm committed to do it, if the court sees its way clear of giving us this opportunity to fight this case the way I'm prepared to fight it and the time I put into it, ... We posed the alternative, either the severance and earlier trial or to put the case over beyond the Judge Leisure case." (Tr. Oct. 2, 1992, at 2-3). The government opposed the motion to sever and, for reasons indicated upon the record (Tr. Oct. 2, 1992, at 6, 10), the motion was denied. During the course of that proceeding, Mr. Burstein, co-counsel for Thomas Gambino, after alluding to the time gap between the verdict in the Gotti case (April 2, 1992) and the superseding indictment in this case (August 4, 1992) and without reference to the Speedy Trial Act, observed that "if this case went in May instead of February it would not be the end of the world." (Tr. Oct. 2, 1992, at 8).

The reference to the time gap which is the crux of this motion prompted the court to inquire of the government why the case was not brought on sooner. The government responded as follows:

> MS. WARD: I can represent to the court between April and August we did investigations to make a determination as to whether or not we should be adding these two additional defendants. Based on testimony that had occurred during the Gotti trial and based on discussions with Mr. Gravano, we made a

determination. We had to make the presentations to the Grand Jury, and we superseded as soon as we possibly could putting in the surveillances, and we thought it was in the best interest of the case and judicial economy, since we intend to try the two individuals on these charges, to combine them with Mr. Gambino because it would have been an identical trial.

(Tr. Oct. 2, 1992, at 8-9).

At the next status conference, October 9, 1992, the following statement was made by Mr. Rosen:

MR. ROSEN: Your Honor, because of a little logistical problem over the holidays, I didn't go to see my client over in the Southern District until yesterday and I come to advise the Court that my client in that case has asked if it is humanly possible and doesn't cause anybody great pain and hardship, that he would prefer me to continue to represent him.

He paid me in the past. We've been together a couple of years on that case. It's a long and involved case and I suggest most respectfully, I know your Honor had declined to sever the case and move it forward, but most respectfully, your Honor, this is a two-week trial and I would ask your Honor to really consider adjourning it then so that I can complete the case before Judge Leisure.

Judge Glasser, I don't mean to be critical but I know your Honor had said you had a lot of cases to try. *Our case doesn't involve any speedy trial problems.* All the defendants are out.

> Again, not to be critical but the Government didn't move with the greatest amount of haste and anxiety to bring Mr. Gambino here to trial. They had their own agenda. They wanted to do some more investigation. They wanted to make additional presentations. That is their right, but in light of what you said last week about your sensitivity to people trying to have a lawyer of their choice, and since I really can't see, and mean this sincerely, any phenomenal prejudice certainly to the Court and to the government in putting it over for a couple of months, I would ask that you really consider most respectfully putting this off until I finish the case in front of Judge Leisure.
>
> I don't see how anybody gets hurt, with all due respect.

(Tr. Oct. 9, 1992, at 2-3) (Emphasis added). During the course of the proceeding on February 19, 1993, the court was informed, without contradiction, that defense counsel indicated to the government that he did not want the matter calendared during the summer months of 1992. (Tr. Feb. 19, 1993, at 24).

On December 7, 1992, the defendant Thomas Gambino filed this motion seeking, among other things, an order "[d]ismissing the superseding indictment against Thomas Gambino because the government failed to comply with the Speedy Trial Act, *and instead trying Thomas Gambino alone on the original indictment.*" (Emphasis added). A hearing on this motion was delayed until February 19, 1993 due to the unavoidable unavailability of counsel, and the trial of this case was fixed for March 22, 1993. The defendant Thomas Gambino makes no Speedy Trial Act claim for the period August 4, 1992 to March 22, 1993. It is the period between March and August of 1992 during which he claims the Speedy Trial clock ran down.

Discussion

The detailed chronology of events has been furnished in the belief that it, more eloquently, perhaps, than any other narrative statement could, places in sharp focus the issue raised by this motion as the court firmly believes it to be, namely: should defense counsel be permitted simultaneously to use the Act as a sword as well as a shield and to sandbag the court and the government in doing so? Or, to put it slightly differently, is the defendant correct when he says "the truth is that the Speedy Trial Act is obviously designed to permit defendants to take advantage of government errors"? (Reply Memorandum of Law in Support of Defendants' Pretrial Motions, at 3).

In the defendant's view, "the government can avoid a finding that it violated the Speedy Trial Act only if it can establish that the time between March and August of 1992 was excludable pursuant to Sec. 3161(h)." The only subdivisions of that section which he contends are arguably relevant are Secs. 3161(h)(1) and 3161(h)(8)(A); he argues, however, that neither of these sections are applicable. The court concurs in the view that neither of those subdivisions is applicable but not in the view that those are the only subdivisions that are relevant.

The government urges the adoption of the view that having made a *Kastigar* motion, the time during which that motion continues to remain under advisement is excludable. The government, having successfully contended when the motion was made that its determination should await the conclusion of the trial, is surely disingenuous in now contending that the Act, designed to accelerate criminal trials, is suspended until the trial has ended. The government also urges the court to give continued efficacy to a finding made on the original indictment, in which all parties concurred, that delay in commencing the trial was excludable because the case

was so complex, pursuant to Sec. 3161(h)(8)(B)(ii). The codefendants in that original indictment, John Gotti and Frank Locascio, have already been tried, convicted, and sentenced. The government urges, however, that since the defendant (Thomas Gambino) was severed from that indictment and is yet to be tried, that finding of complexity is still extant. Finally, the government asserts, that having repeatedly requested a further continuance, the defendant has either waived a Speedy Trial claim or is abusing the process of the Speedy Trial Act to obtain a severance, clearly a purpose for which it was not intended. In his Memorandum of Law, the defendant states: "The only fair way to cure the prejudice from this delay is to sever Mr. Gambino from his codefendants or to permit him to go to trial on the original indictment in this case." (Memorandum of Law in Support of Defendants' Pretrial Motions, at 2).

The defendant places principal reliance upon *United States v. LoFranco*, 818 F.2d 276 (2d Cir.1987). There LoFranco appealed from a judgment of conviction after he pleaded guilty to three counts of a six count indictment. His claim, among others, was a Speedy Trial Act violation. The *ratio decidendi* of the case as stated in a *per curiam* opinion is simply that " 'violations of the defendant's rights to a speedy trial' are non-jurisdictional and therefore waived by a guilty plea that does not include a court-approved reservation of the issue." *Id.* at 277. It is the dictum which follows that the defendant trumpets as pronouncing the doctrine he assiduously advances in support of his position, namely, "that the 'complex case' exclusion remained viable only until the commencement of the first trial of this indictment":

> In holding that LoFranco's guilty plea waived any Speedy Trial Act objections he might have had, we do not imply that there was a violation of the act. We do note, however, that Chief Judge Munson's order of

> September 26, 1985 excluding from computation under the act all time from that date until trial pursuant to Sec. 3161(h)(8), could be interpreted as allowing virtually unlimited delays. We assume that this order was made in anticipation of a particular trial date, thus limiting what might otherwise be a boundless exclusion of time that could undermine the purposes of the Speedy Trial Act. We remind district judges that the length of an exclusion under Sec. 3161(h)(8) for a "complex" case, 18 U.S.C. Sec. 3161(h)(8)(B)(ii), should reasonably be related to the actual needs of the case, and should not be used either as a calendar control device or as a means of circumventing the requirements of the Speedy Trial Act.

The basis for the defendant's reading of that dictum, namely, that an exclusion for complexity has a life expectancy limited by the commencement of the trial, is not readily apparent. On the contrary, it can fairly be argued that the exclusion as applied to *this* defendant *was,* as explained by Assistant U.S. Attorney Ward, *supra,* reasonably related to the actual needs of the case and was not used as a calendar control device. I address the government's assertion of waiver and the defendant's assertion that the only relevant sections of the Speedy Trial

A. Waiver

Those circuits which have squarely confronted the issue of waiver have concluded that 18 U.S.C. Secs. 3161(c)(1) and 3162(a)(2) foreclose a defendant's right to waive a speedy trial. *United States v. Willis*, 958 F.2d 60, 63 (5th Cir.1992); *United States v. Kucik*, 909 F.2d 206, 210-11 (7th Cir.1990), *cert. denied*, 498 U.S. 1070, 111 S.Ct. 791, 112 L.Ed.2d 853 (1991); *United States v. Berberian*, 851 F.2d 236, 239 (9th Cir.1988), *cert. denied*, 489 U.S. 1096, 109 S.Ct. 1567, 103 L.Ed.2d 934 (1989); *United States v.*

Ray, 768 F.2d 991, 998 n. 11 (8th Cir.1985); *United States v. Pringle*, 751 F.2d 419, 433-34 (1st Cir.1984); *United States v. Carrasquillo*, 667 F.2d 382, 388-90 (3d Cir.1982). The view that the Speedy Trial Act cannot be waived is puzzling given a recognition in the Act that it may be. Section 3162(a)(2) provides, in part, that "[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section." Research has not revealed any case in which the Second Circuit has explicitly held that the Speedy Trial Act cannot be waived, although it has uncovered one case which implied that it can. *See United States v. Didier*, 542 F.2d 1182, 1187 (2d Cir.1976) ("Having been put on notice ... that responsibility for speedy trial enforcement rests primarily on the district courts and on the government, not on the defendant, the government should have attempted to obtain either a retrial within 90 day ... or an explicit waiver of that 90 day period from appellant Didier") (emphasis added). In *United States v. Patten*, 826 F.2d 198 (2d Cir.1987), a waiver by virtue of Sec. 3162(a)(8) was recognized.

An examination of two of the cases decided by the circuits which preclude a waiver is, however, revealing. In *United States v. Willis*, 958 F.2d 60 (5th Cir.1992), the district court conditioned granting the defendant's request for a continuance upon his surrendering his right to a speedy trial. He subsequently moved to set aside his conviction on the ground that the Speedy Trial Act was violated. The court granted his motion and reversed the conviction, but made the following observations before arriving at its decision:

> Dismissing an indictment is a sharp remedy, and we have been reluctant to impose it where the defendant has induced the district court to misapply the Act and then relies upon that error to seek dismissal. *United*

> *States v. Eakes*, 783 F.2d 499, 503 (5th Cir.1986).... Where the defendant has successfully convinced the trial court that a continuance is appropriate under a provision of the Act and then later seeks to argue that the district court's ruling on the applicability of the exception was erroneous, "[w]e decline to apply a hypertechnical construction to the language of the Act" and will determine whether a continuance would have been appropriate under Sec. 3161(h)(8).... 783 F.2d at 504. As we recognized in *Eakes*, allowing defendants to sandbag the district court would encourage harmful strategic behavior and straightjacket the district court in ruling under the Act.
>
> * * * * * *
>
> In short, we hold that dismissal of an indictment is inappropriate when a defendant requests a continuance under an erroneous interpretation or application of one of the Act's provisions and the district court simply errs in its application of the Act to the defendant's request. In those cases ... we will look to the circumstances surrounding the continuance and ask whether the district court could have granted a Sec. 3161(h)(8) continuance.

Id. at 63-64. The dismissal of the indictment in *Willis* was based upon the circuit court's assessment that the district court was neither misled nor sandbagged by the defendant. "It (the district court) induced a 'waiver' and then asked the defendant to advise the court when he was ready for trial." *Id.* at 64. In that respect, Willis is plainly distinguishable.

Observations made by the court in *United States v. Pringle*, 751 F.2d 419 (1st Cir.1984), are peculiarly apt to this case:

> Under the Act a waiver ought not to be allowed by the district court and has no effect on a defendant's right to dismissal. Nevertheless, we hold that where a waiver creates delay, such delay will be excludable. *Defense counsel, as officers of the court, have a responsibility to keep in mind the twofold purpose of the Speedy Trial Act:* the interest of the defendant in a speedy trial and the interest of the public in a speedy trial. To the extent the Act protects the defendant's interest, it places limits primarily on the actions of prosecutors and courts; *to the extent that the Act protects the public's interest in a speedy trial, it places limits on the actions of defense counsel as well. Defense counsel may not simultaneously use the Act as a sword and a shield. We think it unethical and dishonest for defense counsel to waive the Act in the trial court and then disclaim such waiver on appeal.*

Id. at 434-35 (emphasis added). In accord with that view, *see United States v. Kucik*, 909 F.2d 206, 210-211 (7th Cir.1990); *United States v. Kington*, 875 F.2d 1091, 1108 (5th Cir.1989); *United States v. Mentz*, 840 F.2d 315, 331 (6th Cir.1988); *see also United States v. Vasquez*, 918 F.2d 329, 337 (2d Cir.1990) (the Speedy Trial Act was not meant to be applied so as to "give gamesmanship priority over the practicalities of trial management.").

The chronological record of events leading up to defendant Thomas Gambino's motion to dismiss make it inconceivable that the public interest will be served by a dismissal of this indictment. The defendant requests that he be tried alone upon the original indictment and seeks its dismissal. He thus makes plain that his real objective is to obtain a severance and, towards that end, brandishes the Speedy Trial Act as a sword. He joined in the requests of his present co-defendants for a continuance and beseeched the

court to delay his trial for two months beyond its scheduled date; nevertheless, with a candor that can only be characterized as remarkable, he espouses "the truth ... that the Speedy Trial Act is obviously designed to take advantage of government errors." The dismissal of this indictment for that reason "rather than build confidence in the fairness of our criminal justice system, ... would be a mockery of it and would justify the citizenry in rising up to destroy the temples of justice.... If the public interest is a valid concern, as it should be, it will not be served by such a perversion of justice." *United States v. Russo*, 550 F.Supp. 1315, 1316-17 (D.N.J.1982). In the course of a colloquy between the court and counsel during the proceedings on February 19, 1993, the court voiced its unawareness of any authority to suggest that equitable considerations were relevant in making determinations concerning the Speedy Trial Act. (Tr. Feb. 19, 1993, at 21-22). Enlightenment in that regard was subsequently provided by *Russo, supra*, at 1320-21, where such considerations were regarded as relevant.

Were this court to grant the defendant Thomas Gambino's motion to dismiss, it would grant that motion without prejudice. The statute, 18 U.S.C. Sec. 3162(a)(2), specifies with particularity the factors to consider in determining whether to dismiss a case with or without prejudice, and they are: "The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." *United States v. Taylor*, 487 U.S. 326, 333, 108 S.Ct. 2413, 2417, 101 L.Ed.2d 297 (1988); *United States v. Kiszewski*, 877 F.2d 210, 213 (2d Cir.1989). The offenses with which Thomas Gambino was charged in the original indictment, conducting or participating directly or indirectly in the conduct of the affairs of an enterprise through a pattern of racketeering activity or the collection of unlawful .debt (18 U.S.C. Sec.

1962(c)) and conspiracy to violate Sec. 1962(c) (18 U.S.C. Sec. 1962(d)), are serious in that each is punishable by imprisonment for twenty years. The facts and circumstances leading up to a dismissal are recounted above and do not warrant even an inference that the government was indifferent to a prompt prosecution of Thomas Gambino, nor is there any suggestion that the United States Attorney for this district has been anything but sedulous in complying with the Speedy Trial Act. On the contrary, insofar as it sought to join two additional defendants with Thomas Gambino, the government furthered the purposes of that Act as is reflected in Sec. 3161(h)(7). The comments on that section of then-Assistant Attorney General William H. Rehnquist in letters dated October 19, 1971 to Senator Ervin and in the 1979 Senate Committee Report 24-25, to be found in Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974* (Federal Judicial Center, 1980) at 134-36, recognize "the utility of multi-defendant trials to effectuate the prompt and efficient dispensation of criminal justice" and that "defendants who are properly charged with the joint commission of an offense should ordinarily be tried together to save the time, expense and inconvenience of separate prosecutions."

It would surely be a mockery of our criminal justice system if that system would require the defendant to be reindicted after a dismissal without prejudice. Insistence upon such a slavish adherence to a purposeless formalism serves neither the interests of justice nor the spirit and intent of the Speedy Trial Act. It would, instead, validate the defendant's view that "the Speedy Trial Act is obviously designed to permit defendants to take advantage of government errors."

B. Relevance of Other Provisions

The defendant, as the court previously noted, asserts that the only provisions of the Speedy Trial Act having relevance to his motion are Secs. 3161(h)(1) and

3161(h)(8)(A), neither of which, the court agrees, is applicable. I now turn to an examination of his assertion that those provisions are the only two that are relevant.

Section 3161(h)(6) provides that the following period of delay shall be excluded in computing the time within which a trial must commence:

> If the ... indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

The moving defendant does not make any Speedy Trial Act claim based upon any prosecution delays prior to the end of the original trial on April 2, 1992, when Gotti and Locascio were found guilty. He contends that the Speedy Trial Act violation occurred during the intervening period between the end of the Gotti trial (which he fixes as March, 1992, when the case was submitted to the jury) and August 4, 1992, the date of the superseding indictment.

It is readily apparent that had the government moved to dismiss the indictment immediately upon the conclusion of the original trial, the intervening period would have been excludable from Speedy Trial Act calculation pursuant to Sec. 3161(h)(6) and there would be no violation of that Act. *See, e.g., United States v. Bounos*, 730 F.2d 468 (7th Cir.1984); United States v. Rodriguez-Restrepo, 680 F.2d 920 (2d Cir.1982). Therefore, to apply the Speedy Trial Act in the current context would surely be exalting form over substance and would, indeed, affirm the defendant's view that "the truth is that the Speedy Trial Act is obviously designed to permit

defendants to take advantage of government errors." It would also affirm the view that such an application of the Speedy Trial Act would make a mockery of our criminal justice system. This observation is particularly true given the defendant's assertion that "[t]he only fair way to cure the prejudice from this delay is to sever Mr. Gambino from his codefendants or to permit him to go to trial on the original indictment in this case." (Memorandum of Law in Support of Defendants' Pretrial Motions, at 2). The defendant's cynical objective in filing this motion is thereby made apparent: (1) A severance from his codefendants will, in some inexplicable way, cause the Speedy Trial Act to disappear, or (2) going to trial on the original indictment, which is twenty months older than the superseding indictment, will, in some inexplicable way, make the Speedy Trial Act disappear. In either case, what he seeks is to be tried alone, using the Speedy Trial Act as the vehicle for accomplishing that result.

Another potentially applicable section of the Speedy Trial Act is Sec. 3161(h)(7), which provides for the exclusion of periods of delay in computing the term within which a trial must begin as follows:

> A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

The meaning of this section is ambiguous, lending itself to at least two interpretations, as follows: One interpretation would require A and B to be indicted together. Subsequently, excludable delay is attributable to A. A unitary view of the speedy trial clock would result in a holding that the speedy trial clock, having stopped as to A, stopped as to B as well. There is considerable authority reaching that result on those facts. A second interpretation would be supported in

a case in which A is initially indicted alone. Later, a superseding indictment is returned in which A is joined with B as to whom the time for trial has not run. If the period of delay in joining codefendant B with A is reasonable and no motion by A for a severance has been granted, the time for trial of A will run in tandem with the time of trial for B. That is to say, the reasonable period of delay is excludable. Although judicial authority in support of this latter interpretation is less explicit, such authority exists and is properly applied to the facts of this case.

First, in support of the latter interpretation are the frequently made observations that rigid time limits will force the courts to disregard the principle of judicial efficiency; that "defendants who are properly charged with the joint commission of an offense should ordinarily be tried together to save the time, expense and inconvenience of separate prosecutions." Partridge, *Legislative History of the Title I of the Speedy Trial Act of 1974* (Federal Judicial Center, 1980) at 136; see also *United States v. Gambino*, 784 F.Supp. 129, 138-39 (S.D.N.Y.1992). Those observations were echoed by this court when, in denying defendant Thomas Gambino's motion to sever made in September, 1992--twenty-one months after he was indicted--it observed: "A severance just really is not appropriate in this case.... [i]t becomes clear to me that I would be trying the same case, the government would be retrying the same case, playing the same tapes, listening to the same witnesses, playing the same videos, which would not be a very good use of judicial resources." (Tr. Oct. 2, 1992, at 10). *See also United States v. Felton*, 592 F.Supp. 172, 185 (D.C.W.D.Pa.1984).

Second, although the court has been unable to find a judicial determination of the applicability of Sec. 3161(h)(7) to the precise facts now at issue, it is persuaded by determinations made on facts which are reasonably analogous

that the section is applicable and justifies a denial of the defendant's motion. In United States v. Tobin, 840 F.2d 867 (11th Cir.1988), A and B were indicted on June 19, 1985. The statutory period would have run on August 29, 1985. The case was first noticed for trial on November 27, 1985. At a calendar call on December 12, 1985, A announced that he was ready for trial. The government stated that B had not yet been arrested and was a fugitive. The court continued the case until a reasonable time after B was apprehended. On February 28, 1986 A moved to dismiss the indictment on Speedy Trial Act grounds. On March 5, 1986 A was severed and subsequently found guilty on October 27, 1986. On appeal, A argued that Sec. 3161(h)(7) was applicable only where two or more defendants were joined over whom the court had jurisdiction. The Eleventh Circuit held that the delay attributable to B is excludable as to A as long as it was reasonable. In concluding that the delay of eight months and ten days was reasonable, the court looked to the "totality of the circumstances prior to trial" and found that the delay was necessary in an attempt to achieve a joint trial. Id. at 869-70.

The distinction between an initially indicted codefendant who was a fugitive, was never arraigned, and over whom the court never had jurisdiction and the codefendants here is difficult to grasp. The indictment of these codefendants four months after the Gotti trial ended, judged by the totality of the circumstances explained by the government, supra at p. 543, for the purpose of achieving a joint trial was plainly reasonable. The government should not be forced to prosecute the first defendant separately at the risk of a speedy trial dismissal.

In accord with Tobin, is *United States v. Pena*, 793 F.2d 486 (2d Cir.1986), in which a reasonable period of time for the apprehension of an indicted codefendant was excluded pursuant to Sec. 3161(h)(7), the court observing: "Congress clearly intended that, where appropriate, joint trials of defendants should continue to be available as a means of

promoting judicial efficiency by avoiding duplicative proof at successive trials. It thus intended that reasonable speedy trial time be excludable, under section 3161(h)(7) when necessary to enable joint trials to go forward." *Id.* at 489-90. Similarly, in *United States v. Piteo*, 726 F.2d 50 (2d Cir.1983), the defendant had originally been indicted alone, and a superseding indictment added his sister as a codefendant. The Second Circuit held:

> [I]n cases involving multiple defendants only one speedy trial clock, *beginning on the date of the commencement* of the most recently added defendant need be calculated under 18 U.S.C. Sec. 3161(h)(7).... In this computation, a delay attributable to any one defendant is chargeable only to the single controlling clock.... So long as the defendants in question are brought to trial within the seventy speedy trial days that began with the clock of the most recently added defendant and so long as any delay is "reasonable," the Speedy Trial Act is not violated.

Id. at 52 (emphasis added). Equally compelling is *United States v. Novak*, 715 F.2d 810 (3d Cir.1983). A superseding indictment, joining the defendant with seven others was filed two months after the original indictment. In addressing a speedy trial issue raised on appeal, the court said:

> We believe that section 3161(h)(7) represents a congressional effort to build into the Speedy Trial Act sufficient flexibility to allow the government to stop criminal activity by arresting the suspected perpetrators as soon as it has probable cause, without precluding a joint trial with compatriots who may be apprehended at a later date. We believe that it is consistent with this congressional intent to apply section 3161(h)(7) so that after defendants are joined for trial, "an exclusion

> applicable to one defendant applies to all codefendants" ... subject to the reasonableness constraint.

Id. at 815.

For all of the foregoing reasons, the motion by Thomas Gambino to dismiss based upon a violation of the Speedy Trial Act is denied.

II

Venue

The government does not oppose the defendants' motion to dismiss Count Three and it is, therefore, granted. Other aspects of the defendants' motion addressed to venue were withdrawn.

III

Surplusage

The defendants move, pursuant to Fed.R.Crim.P. 7(d), to have portions of the indictment contained in paragraphs 1-13, which constitute the Introduction to all counts, stricken as prejudicial surplusage. The governing principle in such a motion is that it "will not be granted unless 'it is clear that the allegation complained of is not relevant to the charge contained in the indictment and is inflammatory and prejudicial.' ... An indictment may properly include any allegation that is 'relevant to the case and will constitute part of the government's proof at trial.' " *United States v. Rastelli*, 653 F.Supp. 1034, 1055 (E.D.N.Y.1986); *United States v. Castellano*, 610 F.Supp. 1359, 1428 (S.D.N.Y.1985); *United States v. Persico*, 621 F.Supp. 842, 860

(S.D.N.Y.1985). The parties agreed, at oral argument, that a ruling on this aspect of the motion, involving as it does a balancing of the probative value of relevant evidence against the prejudicial impact of such evidence, should await the trial when evidentiary rulings can be made in context. In the interim, the parties also agreed, neither the government nor the court should refer to the challenged portion of the indictment. The court is in accord with that agreement and hereby so orders it insofar as it precludes the government from reading or referring to the challenged portions of the indictment in its opening statement. The court, on its part, will refrain from doing the same in selecting the jury.

IV

Motion to Preclude Evidence of "Truth-Telling" Provision

The defendants move the court to issue an order that would preclude the government from proving the "truth-telling" provisions of Salvatore Gravano's plea agreement. They rely upon Rule 403, Fed.R.Evid., in support of their motion and also upon the completely speculative assumption that "In reality, as informers have come to know from a course of prosecutorial behavior, their sword of Damocles is illusory." (Defendant's Memorandum in Support of Pretrial Motions at 22). In making that motion, the defendants candidly concede that the authority in this circuit is that an entire plea agreement may be offered by the government and received in evidence after the credibility of the witness has been attacked. *United States v. Cosentino*, 844 F.2d 30, 33 (2d Cir.), *cert. denied*, 488 U.S. 923, 109 S.Ct. 303, 102 L.Ed.2d 322 (1988); *United States v. Borello*, 766 F.2d 46, 56-57 (2d Cir.1985). The court will not unduly burden this opinion by a lengthy refutation of what it regards as a motion entirely devoid of merit if not entirely specious.

It resists the temptation to do so in the belief that the observation of Judge Learned Hand is an eloquent response to and refutation of that motion. In *DiCarlo v. United States*, 6 F.2d 364, 368 (2d Cir.1925) he wrote:

> While, of course, we recognize that the prosecution is by custom more rigidly limited than the defense, we must decline to assimilate its position to that of either judge or jury, or to confine a prosecuting attorney to an impartial statement of the evidence. He is an advocate, and it is entirely proper for him as earnestly as he can to persuade the jury of the truth of his side, of which he ought to be thoroughly convinced before he begins at all. To shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice; it is to deny what has always been an accepted incident of jury trials, except in those jurisdictions where any serious execution of the criminal law has yielded to a ghostly phantom of the innocent man falsely convicted.

It follows inevitably, that to shear the prosecution of all admissible evidence while leaving wide latitude to the defense, is similarly to unbalance the scales of justice. This aspect of defendants' motion is denied.

V

Motion to Compel Disclosure of Government Dealings with Cooperating Witnesses

The defendants seek an order that would compel the government to disclose its history of dealing with cooperating witnesses who did not tell the truth in the event the court denied their motion to preclude the "truth-telling" provision of Salvatore Gravano's plea agreement. More specifically, they ask the government to be compelled to produce: (1) the

identity of every cooperating witness who has admitted lying to the government; (2) the identity of every cooperating witness the government believes lied to it; and (3) detailed accounts of the actions taken with respect to each of these witnesses. This motion is frivolous, at best, and is denied.

This motion is predicated upon the unsubstantiated premise that the government never prosecuted a cooperating witness who violated his "truth-telling" obligation of his plea agreement. If, in fact, such is the case, it may be because cooperating witnesses have been testifying truthfully, or because the government, upon subsequently learning that the witness did not testify truthfully chose not to prosecute in the proper exercise of prosecutorial discretion. That is not to say, however, even assuming the premise, that the government will not in the future prosecute cooperating witnesses who commit perjury. In this regard, it is appropriate to note that the prosecution has a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984).

In addition, the information the defendants seek, assuming it could be gathered, would surely require a small army of investigators combing through every criminal prosecution ever brought in which a cooperating witness testified and then attempting to determine, in some unimaginable way, whether the cooperating witness lied. The absurdity of this request is self-evident. It might also be added that assuming such a task could be accomplished in some undefinable period of time, the information, if relevant at all, would be precluded under Rule 403, Fed.R.Evid., for the reasons that such minuscule probative value as this evidence would have would be overwhelmingly outweighed by the dangers of confusion, misleading the jury, and considerations of undue delay and waste of time.

VI

Disclosure of Psychological and Polygraph Reports of Salvatore Gravano and Surveillance Reports of Thomas Gambino

The defendants seek the disclosure of results of psychological examinations and polygraph tests concerning Salvatore Gravano pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The government, in its responsive memorandum, states that Gravano has not yet been examined by a psychologist. The government also acknowledges awareness of its constitutional obligations under *Brady* and its progeny and promises to provide the defendants with material consonant with that obligation. In the event the government is in doubt as to whether material it possesses is embraced by *Brady*, it may submit it to the court for *in camera* review.

The defendant Thomas Gambino also requests the court to direct the government to make available to him all its surveillance reports of Thomas Gambino. His entitlement to those reports, he claims, is mandated by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). More specifically, Thomas Gambino contends, surveillance reports which reflect that he has not been observed with others with whom he is alleged to have been allied would tend to prove that he did not occupy the supervisory position the government ascribes to him.

This court was confronted with this precise issue in *United States v. Scarpa*, 897 F.2d 63 (2d Cir.1990). There, the defendants sought discovery pursuant to Rule 16(a)(1)(A), Fed.R.Crim.P., of electronic surveillance tape recordings made by the Kings County District Attorney at a social club the defendants frequented. Notwithstanding the absence of any

exculpatory material subject to production under *Brady*, the defendants argued that the entirely pedestrian conversations intercepted makes them relevant as probative of their innocence. This court's refusal to order disclosure of the tapes was affirmed by the circuit court which held that "A defendant may not seek to establish his innocence, ... through proof of the absence of criminal acts on specific occasions." 897 F.2d at 70. The defendant's gloss upon the holding of this court and the circuit court, suggesting that those holdings were based upon "the result of minimization efforts," is not supported by a reading of either the circuit court's opinion or this court's Memorandum and Order dated May 16, 1988. At page 9 of that Order, this court wrote:

> As the government points out, however, the movants are effectively arguing that the very irrelevance of these statements makes them relevant. The defendants cannot hope to use a process of elimination to defend themselves by presenting evidence of their *noncriminal* activities. Such evidence would only be relevant if the indictment charged the defendants with ceaseless criminal conduct. Furthermore, the government convincingly explains the lack of inculpatory evidence on the tapes as the result of minimization efforts by the Kings County District Attorney, and the technical limitations of the eavesdropping device.

The government is cognizant of its *Brady* obligations and will make known to the defendant any exculpatory information the surveillance logs contain.

VII

Advance Notice of 404(b) Evidence

The defendants have requested that the government provide reasonable notice in advance of trial of all evidence the government intends to offer pursuant to rule 404(b), Fed.R.Evid. This aspect of the motion is granted. The government has acknowledged its obligation to provide the information requested and its intention to discharge its obligation.

VIII

Motion to Suppress January 17, 1986 Conversation Between Gotti and Remini

The defendant Thomas Gambino seeks this relief claiming that because he gave immunized testimony before the grand jury concerning this conversation, the transcript of which is known to the prosecutors in this case, the government has acquired a tactical advantage. The prosecutors, in response, deny any familiarity with that testimony. Be that as it may, the defendant recognizes that this motion must be and is hereby denied by virtue of *United States v. Riviecco*, 919 F.2d 812 (2d Cir.1992). He has made the motion solely for the purpose of preserving the issue for review at a later date should the need to do so arise.

SO ORDERED.

Appendix D

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of September, one thousand nine hundred and ninety-five.

USA

v

Gotti

FILED

SEP 8 1995

GEORGE LANGE III
CLERK

Dkt No.: 93-1754

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Thomas Gambino.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador

Beth J. Meador,
Administrative Attorney

Appendix E

Judgment Including Sentence
United States District Court Eastern District of New York

United States District Court
Eastern District Of New York
----------X

United States Of America

-v-

Thomas Gambino
----------X

Judgment Including Sentencing Under The Sentencing Reform Act

Case number: CR90-1051(S-3)01

Michael Rosen, Esq.
150 East 18th Street
32nd Floor
New York, NY 10155

Defendant's Attorney & Address

THE DEFENDANT:
X was found guilty on count(s) one and two after a plea of not guilty.

Accordingly, the defendant is ADJUDGED guilty of such count(s), which involve the following offenses:

Title & Section	Nature & Offense	Count Number(s)
T. 18 USC 1962 (C)	Racketeering	One(1)
T. 18 USC 1962 (D)	Conspiracy To Engage In Racketeering	Two(2)

The defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_x_ It is ordered that the defendant shall pay to the United States a special assessment of $100 which shall be due _x_ immediately ____ as follows:

It is further ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. #083-28-1883

Defendant's Date of Birth 8/23/29

Defendant's Mailing Address:
82 Pinehurst St.
Lido Beach, New York, 11561

October 29, 1993
Date of Imposition of Sentence

/s/
I. Leo Glasser, U.S.D.J.

November 1st, 1993
Date

Defendant's Residence Address:
Same As Above

A True Copy Attest
Date: 11/1/93
Robert C. Heinnemann
Clerk of the Court
By: /s/
Deputy Clerk

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months. DEFENDANT TO CONTINUE BAIL PENDING APPEAL.

* * * * * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years supervised release.

* * * * * *

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $100,100.00, consisting of a fine of $100,000.00 and a special assessment of $100.00.

X These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

COUNT ONE (1)
COUNT TWO (2)

This sum shall be paid __X__ immediately
_____ as follows:

_____ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

_____ The interest requirement is waived.

_____ The interest requirement is modified as follows:

STATEMENT OF REASONS

__X__ The Court adopts the factual findings and guideline application in the presentence report.

* * * * * *

Appendix F

Statutory Provisions Involved in this Appeal
18 U.S.C. §§ 3161 and 3162

18 U.S.C. § 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall

commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation,

and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best

interests of the public and the defendant in a speedy trial.

(B) The actors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the

Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly--

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so

advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

18 U.S.C. § 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

> (A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;
>
> (B) in the case of a counsel retained in connection with the defense of a defendant, by

imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

COUNSEL PRESS
11 EAST 36TH STREET, NEW YORK, NEW YORK 10016
(212) 685-9800; (516) 222-1021; (914) 682-0992; (908) 494-3366; (718) 852-9800; (315) 423-9800

(135462)

Supreme Court, U.S.
FILED
APR 3 1996
CLERK

No. 95-847

In the Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS GAMBINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a violation of the 70-day time limit of the Speedy Trial Act, 18 U.S.C. 3161(c)(1), can constitute harmless error.

2. Whether the time between petitioner's filing of a pretrial motion to dismiss the indictment based on *Kastigar* v. *United States*, 406 U.S. 441 (1972), and the hearing on the motion, after the trial, constituted excludable "delay resulting from any pretrial motion" under 18 U.S.C. 3161(h)(1)(F).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Arizona v. *Fulminante*, 499 U.S. 279 (1991)	14
Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988)	13, 14, 15
Brecht v. *Abrahamson*, 113 S. Ct. 1710 (1993)	
Henderson v. *United States*, 476 U.S. 321 (1986)	
Kastigar v. *United States*, 406 U.S. 441 (1972)	3, 9
Rose v. *Clark*, 478 U.S. 570 (1986)	14
United States v. *Beard*, 41 F.3d 1486 (11th Cir. 1995)	9-10
United States v. *Bermea*, 30 F.3d 1539 (5th Cir. 1994), cert. denied, 115 S. Ct. 1113 (1995)	10
United States v. *Clymer*, 25 F.3d 824 (9th Cir. 1994)	9
United States v. *Fields*, 39 F.3d 439 (3d Cir. 1994)	11
United States v. *Gutierrez*, 48 F.3d 1134 (10th Cir. 1995)	10
United States v. *Kington*, 875 F.2d 1091 (5th Cir. 1989)	11
United States v. *Kucik*, 909 F.2d 206 (7th Cir. 1990), cert. denied, 498 U.S. 1070 (1991)	11
United States v. *Mechanik*, 475 U.S. 66 (1986)	14
United States v. *Mentz*, 840 F.2d 315 (6th Cir. 1988)	11-12
United States v. *Pringle*, 751 F.2d 419 (1st Cir. 1984)	12

Cases—Continued: Page

United States v. *Riley*, 991 F.2d 120 (4th Cir.), cert. denied, 114 S. Ct. 392 (1993) 10
United States v. *Rojas-Contreras*, 474 U.S. 231 (1985) 10
United States v. *Taylor*, 487 U.S. 326 (1988) 13, 15
United States v. *Young*, 45 F.3d 1045 (10th Cir. 1995) 10

Statutes and rule:

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*:
18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2
Speedy Trial Act, 18 U.S.C. 3161 *et seq.* 3
18 U.S.C. 3161(c)(1) 5, 8, 14, 15
18 U.S.C. 3161(h)(1)(F) 7, 8, 9
18 U.S.C. 3161(h)(6) 6
18 U.S.C. 3161(h)(7) 6
18 U.S.C. 3161(h)(8)(A) 3, 7, 11
18 U.S.C. 3162(a)(2) 12, 13
28 U.S.C. 2111 12
Fed. R. Crim. P. 52(a) 13

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-847

THOMAS GAMBINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 59 F.3d 353. The opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 82a-108a) is reported at 818 F. Supp. 541. The opinion of the district court denying petitioner's motion for a new trial (Pet. App. 32a-81a) is reported at 835 F. Supp. 74.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1995. A petition for rehearing was denied on September 8, 1995. Pet. App. 109a. The petition for a

writ of certiorari was filed on November 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of participating in the conduct of the affairs of an enterprise engaged in a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c); and conspiring to do so, in violation of 18 U.S.C. 1962(d). He was sentenced to 60 months' imprisonment, to be followed by five years of supervised release, and fined $100,000. Gov't C.A. Br. 1.

1. The government's evidence at trial established that petitioner was a captain in the Gambino Family of La Cosa Nostra who supervised illegal gambling and loansharking businesses in Connecticut. Petitioner reported to John Gotti, the boss of the Gambino Family, and regularly conversed with Gotti and other members of the Gambino Family. Most conversations took place in New York, at the Ravenite Social Club (which served as the Gambino Family's headquarters) or at the Bergin Hunt and Fish Club. Video surveillance tapes captured petitioner regularly visiting the Ravenite Social Club, and they frequently showed petitioner conversing with Gotti and other members of the Gambino Family while they walked outside the club. Salvatore Gravano, a Gambino Family "consigliere" who participated in many recorded conversations and who had entered into a cooperation agreement with the government, also testified about

petitioner's role in the Gambino Family. Pet. App. 3a, 20a; Gov't C.A. Br. 4-13.[1]

2. a. On December 12, 1990, petitioner, John Gotti, Salvatore Gravano, and Frank Locascio were indicted. Petitioner was arraigned the same day and released on bail. On December 21, 1990, the district court concluded that the complexity of the case warranted an extension of the time deadlines imposed by the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, and entered an order of excludable delay in accordance with 18 U.S.C. 3161(h)(8)(A). On June 7, 1991, the court reaffirmed its finding of excludable delay under the Speedy Trial Act, again relying on the complexity of the case. Pet. App. 4a; Gov't C.A. Br. 15.

b. On June 26, 1991, petitioner moved to dismiss the indictment on the ground that a portion of the government's proof was derived from his immunized testimony before a prior grand jury. The district court reserved decision on the motion and deferred holding an evidentiary hearing pursuant to *Kastigar* v. *United States*, 406 U.S. 441 (1972), until after the trial.[2] The court scheduled the trial to begin on September 23, 1991, but counsel for two co-defendants were disqualified shortly before trial. The replacement counsel requested a postponement of the trial date, petitioner did not object, and the court rescheduled the trial for January 20, 1992. On October 3, 1991, the court ruled that the period between

---

[1] The government's evidence at trial is set out in the district court's opinion denying petitioner's motion for new trial. See Pet. App. 34a-45a.

[2] On July 16, 1993, the district court held the hearing and denied the motion. Pet. App. 4a-5a; Gov't C.A. Br. 16. See pp. 8-9, *infra*.

October 3, 1991, and January 20, 1992, was excludable delay arising from the complexity of the case. Pet. App. 5a; Gov't C.A. Br. 16.

c. The new trial date created a new scheduling problem because the State of New York had intended to try petitioner on other criminal charges in January 1992. The government moved to sever petitioner's trial and petitioner did not object. On October 23, 1991, the district court granted the severance. Shortly thereafter, co-defendant Gravano entered into a cooperation agreement with the government and pleaded guilty to a superseding information. Co-defendants Gotti and Locascio went to trial on January 21, 1992, and were found guilty on April 2, 1992. Pet. App. 5a; Gov't C.A. Br. 16.

d. On August 4, 1992, the government unsealed a superseding indictment that charged petitioner with additional offenses and added two new co-defendants, Giuseppe Gambino and Philip Loscalzo. On August 21, 1992, the government informed the court that it would be prepared to go to trial on the superseding indictment within 70 days. Petitioner's co-defendants, however, requested a trial date after the second week of January 1993. The district court set the trial for February 1, 1993. It also entered an order of excludable delay, based on the continuing complexity of the case, as to the intervening time until trial. Pet. App. 5a; Gov't C.A. Br. 16-17.

e. On September 24, 1992, petitioner moved for a severance of his trial or for a postponement of the trial date until the conclusion of a conflicting trial in which his counsel was involved. Petitioner's counsel told the district court that "if this case went in May [1993] instead of February [1993] it would not be the end of the world." Pet. App. 5a; Gov't C.A. Br. 17-18.

The court, however, denied both motions. Two weeks later, on October 9, 1992, petitioner renewed his motion for a postponement of the trial date. His counsel again informed the court that "[o]ur case doesn't involve any speedy trial problems." Pet. App. 6a; Gov't C.A. Br. 18 (emphasis omitted).

3. On December 7, 1992, petitioner moved to dismiss the superseding indictment because he had not been tried on the original indictment within the 70-day time limit of the Speedy Trial Act, 18 U.S.C. 3161(c)(1). He asserted that the speedy trial clock had run during the 124-day period between the conclusion of the trial of his original co-defendants on April 2, 1992, and the filing of the superseding indictment on August 4, 1992. Petitioner did not seek dismissal of the charges with prejudice, but rather requested that he be tried alone on the original indictment. Pet. App. 6a; Gov't C.A. Br. 18.

The district court denied petitioner's motion. Pet. App. 82a-108a. The court ruled that, in light of the sequence of events leading up to the motion, petitioner was estopped from asserting his claim that the Speedy Trial Act had been violated. *Id.* at 89a-98a. The court observed that the remedy sought by petitioner "ma[de] plain that his real objective [was] to obtain a severance and, towards that end, [he] brandishes the Speedy Trial Act as a sword." *Id.* at 94a. It stated that "[w]ere this court to grant [petitioner's] motion to dismiss, it would grant that motion without prejudice." *Id.* at 95a. The court added that "[i]t would surely be a mockery of our criminal justice system if that system would require [petitioner] to be reindicted after a dismissal without prejudice." *Id.* at 96a.

The court also found it "readily apparent that had the government moved to dismiss the indictment immediately upon the conclusion of the original trial, the intervening period [until the superseding indictment was returned] would have been excludable from the Speedy Trial Act calculation pursuant to [18 U.S.C. 3161(h)(6)] and there would be no violation of that Act." Pet App. 97a. The court concluded that "to apply the Speedy Trial Act in the current context would surely be exalting form over substance * * * [and] would also affirm the view that such an application of the Speedy Trial Act would make a mockery of our criminal justice system." *Id.* at 97a-98a.

Alternatively, the district court ruled that no Speedy Trial Act violation occurred because petitioner's speedy trial clock was reset to zero under 18 U.S.C. 3161(h)(7) when the superseding indictment added two new co-defendants. Pet. App. 98a-102a. The court found that "[t]he indictment of the[] codefendants four months after the Gotti trial ended, judged by the totality of the circumstances explained by the government, * * * for the purpose of achieving a joint trial was plainly reasonable." *Id.* at 100a.

4. The court of appeals concluded that petitioner's trial did not commence within the time limits set by the Speedy Trial Act, but nevertheless affirmed petitioner's conviction. Pet. App. 1a-31a.

The court of appeals found that the 70-day time limit of the Speedy Trial Act expired during the 124-day period between the conclusion of the trial of his original co-defendants on April 2, 1992, and the filing of the superseding indictment on August 4, 1992. Pet. App. at 6a-17a. It rejected the government's argument that the 124-day period constituted excludable

delay within the scope of the December 1990 and August 1992 orders entered by the district court pursuant to 18 U.S.C. 3161(h)(8)(A) based on the complexity of the case. Pet. App. 6a-9a. The court also rejected the government's argument that petitioner's speedy trial clock was tolled pursuant to 18 U.S.C. 3161(h)(1)(F) when he filed his pretrial *Kastigar* motion in June 1991. Pet. App. 9a-11a. The court additionally rejected the government's argument that petitioner had waived the protection of the Speedy Trial Act because his counsel deliberately sought to delay the trial. *Id.* at 11a-16a. Finally, the court rejected the government's argument that the joinder of the two new co-defendants in the superseding indictment reset petitioner's speedy trial clock under 18 U.S.C. 3161(h)(7), observing that the joinder occurred "only *after* the challenged delay." Pet. App. 16a-17a. The court of appeals accordingly concluded that the district court erred in not finding that the Speedy Trial Act had been violated. *Ibid.*

The court of appeals ruled, however, that the error was harmless. Pet. App. 17a-19a. The court explained that "[i]f a criminal defendant is not brought to trial within 70 non-excluded days from the filing of an indictment, the mandatory remedy provided by the Act is dismissal of the indictment on motion of the defendant, although the court may, within its discretion, dismiss the case without prejudice." *Id.* at 17a. The court observed, however, that the issue in this case was "what relief is available to a defendant when the original indictment's time on the speedy trial clock has run out, but in the meanwhile a superseding indictment has been filed by the time defendant moves for dismissal of the original indictment." *Id.* at 18a.

The court of appeals agreed with the district court "that dismissal with prejudice would not have been warranted." Pet. App. 18a. "Given [the] dismissal without prejudice," the court stated, "the government would have been free to seek to have [petitioner] reindicted; and even [petitioner] now concedes that reindictment would have been inevitable." *Id.* at 19a. The court therefore concluded that the district court's failure to dismiss the indictment without prejudice "was harmless and [petitioner's] conviction must stand." *Ibid.* The court added that its holding was "not a signal that affirmance of a district court's failure to dismiss an indictment on harmless error grounds, so long as a 'without prejudice' analysis is undertaken as mandated by the Act, will routinely follow." *Ibid.* "On the contrary," the court explained, "since we review the question of prejudice *de novo*, non-dismissal in the event of a violation will always risk nullifying an entire trial." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 14-24) that the court of appeals erred in holding that a violation of 18 U.S.C. 3161(c)(1) is subject to harmless error analysis. He also contends (Pet. 25-27) that there is a conflict in the circuits concerning whether the entire time period during which a deferred pretrial motion is pending constitutes excludable delay under 18 U.S.C. 3161(h)(1)(F). Neither contention warrants this Court's review.

1. Petitioner's arguments are premised on the court of appeals' finding of a Speedy Trial Act violation. In our view, however, the court's finding is incorrect. The Speedy Trial Act requires that a defendant be tried "within seventy days" of the later

of either the filing of an indictment or information, or the defendant's first appearance before a judicial officer. But the Act excludes from that 70-day period "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(F).

In *Henderson* v. *United States*, 476 U.S. 321, 330 (1986), the Court indicated that the effect of that provision is to exclude "all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary.'" Here, petitioner filed a motion to dismiss the indictment on June 26, 1991, based on *Kastigar* v. *United States*, 406 U.S. 441 (1972). See p. 3, *supra*. The district court held a hearing on that motion after the trial on July 16, 1993. Because the period between June 26, 1991, and July 16, 1993, constituted excludable delay under Section 3161(h)(1)(F), no violation of the Speedy Trial Act occurred in this case.

The court of appeals rejected the government's argument that the entire period during which petitioner's *Kastigar* motion was pending constituted excludable delay under Section 3161(h)(1)(F). Pet. App. 9a-11a. Instead, the court agreed with the reasoning of the Ninth Circuit in *United States* v. *Clymer*, 25 F.3d 824, 830 (9th Cir. 1994), which held that Section 3161(h)(1)(F) "applies only when the delay in bringing the case to trial is the *result* of the pendency of a pretrial motion." As petitioner notes (Pet. 25), the Second Circuit's decision in this case and the Ninth Circuit's decision in *Clymer* conflict with decisions of the Fourth and Eleventh Circuits. See *United States* v. *Beard*, 41 F.3d 1486, 1489 (11th

Cir. 1995); *United States* v. *Riley*, 991 F.2d 120, 124 (4th Cir.), cert. denied, 114 S. Ct. 392 (1993).[3]

Contrary to petitioner's contention (Pet. 25-27), however, this case is not a suitable one for resolving that conflict among the courts of appeals. Petitioner prevailed on that issue, and there is no reason for this Court to review the issue at the prevailing party's insistence. Moreover, even if the entire period during which petitioner's *Kastigar* motion was pending did not constitute excludable delay, no violation of the Speedy Trial Act occurred in this case for at least two other reasons.

First, the 124-day period between the conclusion of the trial of petitioner's original co-defendants on April 2, 1992, and the unsealing of the superseding indictment on August 4, 1992, was excludable pursuant to the "ends of justice" continuance entered by the district court on December 21, 1990. Under 18 U.S.C. 3161(h)(8)(A), the district court was authorized to grant the continuance after finding that "the ends of justice served by taking such action outweigh[ed] the best interest of the public and the defendant in a speedy trial." See, *e.g.*, *United States* v. *Rojas-Contreras*, 474 U.S. 231, 236 (1985). Here, the district court found that the continuance was justified because the case was "complex" within the meaning of Section 3161(h)(8)(B)(ii).

The court of appeals "th[ought] the December 1990 order [was] best understood as having been made in

---

[3] The decision here and the Ninth Circuit's decision in *Clymer* also conflict with decisions of the Fifth and Tenth Circuits. See *United States* v. *Gutierrez*, 48 F.3d 1134, 1136 (10th Cir. 1995); *United States* v. *Young*, 45 F.3d 1405, 1411 & n.6 (10th Cir. 1995); *United States* v. *Bermea*, 30 F.3d 1539, 1568 (5th Cir. 1994), cert. denied, 115 S. Ct. 1113 (1995).

contemplation of the commencement of the trial on the original indictment" (Pet. App. 8a), but the complexity of the case against petitioner was not resolved by the trial of his original co-defendants. Indeed, even after petitioner's trial was severed on October 23, 1991, the case against him involved review of four separate court-authorized electronic surveillances conducted between 1985 and 1990, as well as hundreds of hours of video surveillance conducted over the same time period. See Gov't C.A. Br. 29-30. Moreover, although the district court stated (Pet. App. 89a) that Section 3161(h)(8)(A) was not applicable in denying petitioner's motion to dismiss, the court also observed (Pet. App. 91a) that "it can fairly be argued that the exclusion as applied to *this* [petitioner] *was* * * * reasonably related to the actual needs of the case and was not used as a calendar control device." Because the 124-day period of pretrial delay of which petitioner complains was reasonably related to the actual needs of the case because of to its complexity, that 124-day period was properly excludable under Section 3161(h)(8)(A).

In addition, the 124-day period of pretrial delay was properly excludable under the Speedy Trial Act because petitioner's own conduct contributed to the delay. As the court of appeals pointed out, several courts have concluded that "when [a] defendant's conduct causes or contributes to a period of delay, that time may be excluded from the running of [t]he speedy trial clock." Pet. App. 12a; see, *e.g.*, *United States* v. *Fields*, 39 F.2d 439, 442-443 (3d Cir. 1994); *United States* v. *Kucik*, 909 F.2d 206, 211 (7th Cir. 1990), cert. denied, 498 U.S. 1070 (1991); *United States* v. *Kington*, 875 F.2d 1091, 1108 (5th Cir. 1989); *United States* v.

Mentz, 840 F.2d 315, 331 (6th Cir. 1988); *United States* v. *Pringle*, 751 F.2d 419, 434-435 (1st Cir. 1984).

The record in this case (see Pet. App. 15a, 88a) shows that, after petitioner's trial was severed, his counsel explicitly asked the government to delay the start of the trial until after the summer of 1992—the precise period of delay about which petitioner now complains. The court of appeals concluded (*id.* at 15a-16a) that that request did not give rise to excludable delay because it was made to the prosecutor rather than the district court. The government, however, shares equal responsibility with the district courts for ensuring compliance with the Speedy Trial Act. Because petitioner's request for a delay of the trial beyond the summer of 1992 lulled the government into a "false sense of security," the 124-day period between the conclusion of the trial of petitioner's original co-defendants on April 2, 1992, and the unsealing of the superseding indictment on August 4, 1992, was properly excludable under the Speedy Trial Act. See *United States* v. *Pringle*, 751 F.2d at 434.

2. In any event, the court of appeals correctly decided that, in the particular circumstances of this case, the district court's failure to dismiss the superseding indictment without prejudice was harmless error.

Under the Speedy Trial Act, "[i]f a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). A court reviewing a claimed Speedy Trial Act violation, however, must also abide by 28 U.S.C. 2111, which provides that "[o]n the hearing of any appeal * * *, the court shall give judgment after an examination of

the record without regard to errors or defects which do not affect the substantial rights of the parties." Federal Rule of Criminal Procedure 52(a) similarly provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." This Court noted in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988), that "Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." Hence, the mandatory dismissal provision of 18 U.S.C. 3162(a)(2) must be read in conjunction with the harmless error provisions of 28 U.S.C. 2111 and Rule 52(a).

Contrary to petitioner's contention (Pet. 18-22), this Court's decision in *United States* v. *Taylor*, 487 U.S. 326 (1988), does not preclude the harmless error analysis adopted by the court of appeals in this case. In that case, the Court merely concluded that a district court abused its discretion in dismissing an indictment with prejudice for a Speedy Trial Act violation without considering all of the factors relevant to the choice of remedy that are specified in 18 U.S.C. 3162(a)(2). *Taylor*, 487 U.S. at 335-344. The Court had no occasion in *Taylor* to consider whether harmless error analysis applies to a district court's failure to dismiss an indictment based on an erroneous ruling that no violation of the Speedy Trial Act occurred.

Nor is there merit in petitioner's claim (Pet. 22-24) that a Speedy Trial Act error is a "structural defect" that is immune from harmless error analysis. This Court has made clear that harmless error analysis is not limited simply to errors that occur during the

criminal trial itself, see *Bank of Nova Scotia* v. *United States*, 487 U.S. at 254-256; *United States* v. *Mechanik*, 475 U.S. 66, 71-72 (1986), and that the types of "structural defects" that are immune from harmless error analysis are those "constitutional deprivations"—such as the total deprivation of the right to counsel—without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)); see also *Bank of Nova Scotia* v. *United States*, 487 U.S. at 256-257; *United States* v. *Mechanik*, 475 U.S. at 72.

The court of appeals correctly concluded that the violation of 18 U.S.C. 3161(c)(1) in this case was subject to harmless error analysis. The error did not involve any constitutional deprivation that resulted in a "structural defect" in the trial mechanism; rather, the failure to bring petitioner to trial within 70 days was a statutory violation of the Speedy Trial Act's time limit. The violation did not affect the fact-finding process at trial, involve a right that protects fundamental values unrelated to the fact-finding process, or immunize petitioner from prosecution. To the contrary, the remedy provided by the Act—*i.e.*, dismissal of the indictment—would have had no effect on the outcome of the proceedings in this case if the district court had imposed it.

The district court had unequivocally stated that it would have dismissed the indictment without prejudice had it found a violation, and the court of appeals agreed that a dismissal with prejudice would not have been warranted. In addition, the superseding indict-

ment had been returned even before petitioner filed his motion to dismiss, and petitioner conceded in the court of appeals "that reindictment would have been inevitable" if the superseding indictment had been dismissed without prejudice. Pet. App. 19a. Because the record demonstrated that petitioner would have been in no better position had the superseding indictment been dismissed without prejudice, the court of appeals correctly concluded that the district court's failure to dismiss the superseding indictment for a violation of 18 U.S.C. 3161(c)(1) was harmless error. Because that decision does not conflict with any decision of this Court or of any other court of appeals and does not have far-reaching consequences,[4] further review is unwarranted.

---

[4] There is no substance to petitioner's assertions (Pet. 17) that the court of appeals' decision "will inevitably encourage the government both to ignore the Act and to engage in brinkmanship before the district court." The court of appeals emphasized that its holding was "not a signal that affirmance of a district court's failure to dismiss an indictment on harmless error grounds, so long as a 'without prejudice' analysis is undertaken as mandated by the Act, will routinely follow." Pet. App. 19a. The court explained that "since we review the question of prejudice *de novo*, non-dismissal in the event of a violation will always risk nullifying an entire trial." *Ibid.* This Court noted in *United States* v. *Taylor*, *supra*, that "a truly neglectful attitude on the part of the Government [in complying with the Speedy Trial Act] reasonably could be factored against it in a court's consideration" of whether to dismiss an indictment with or without prejudice. 487 U.S. at 338. Moreover, as the Court noted in *Taylor*, "[t]he Speedy Trial Act also permits a district court directly to punish dilatory counsel, including a prosecutor, through a monetary fine, suspension from practice, or by filing a report with the appropriate disciplinary committee." *Id.* at 342 n.14 (statutory citations omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

APRIL 1996

Supreme Court, U.S.
F I L E D
APR 19 1996
CLERK

No. 95-847

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS GAMBINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

DAVID A. BARRETT
Counsel of Record
DUKER & BARRETT, L.L.P.
1585 Broadway
New York, New York 10036
(212) 969-5600

MICHAEL ROSEN
17 Battery Place
New York, New York 10007

GERALD L. SHARGEL
1585 Broadway
New York, New York 10036

JUDD BURSTEIN
99 Park Avenue
New York, New York 10016

GRAHAM HUGHES
40 Washington Square South
New York, New York 10012

April 19, 1996

TABLE OF CONTENTS

PAGE

I. This Appeal Raises Several Issues of National Importance Under the Speedy Trial Act, Including a Circuit Conflict that Is Ripe for Resolution 3

II. The "Harmless Error" Doctrine Should Not Be Applied to Excuse Government Violation of the Speedy Trial Act 5

CONCLUSION 9

TABLE OF AUTHORITIES

PAGE

Cases:

Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) 6

Connecticut National Bank v. Germain, 503 U.S. 249 (1992) 2

Henderson v. United States, 476 U.S. 321 (1986) 3-5

United States v. Beard, 41 F.3d 1486 (11th Cir. 1995) 3

United States v. Bermea, 30 F.3d 1539 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1113 (1995) 3

United States v. Clymer, 25 F.3d 824 (9th Cir. 1994) 3-4

United States v. Gutierrez, 48 F.3d 1134 (10th Cir.), *cert. denied*, 115 S. Ct. 2598 (1995) 3

United States v. Marion, 404 U.S. 307 (1971) 6

United States v. Mechanik, 475 U.S. 66 (1986) 6

United States v. Riley, 991 F.2d 120 (4th Cir.), *cert. denied*, 114 S. Ct. 392 (1993) 3

United States v. Rojas-Contreras, 474 U.S. 231, 238 (1985) 6

United States v. Taylor, 487 U.S. 326 (1988) 2, 5-8

United States v. Young, 45 F.3d 1405 (10th Cir.), *cert. denied*, 115 S. Ct. 2633 (1995) 3

Statutes and Rules:

18 U.S.C. § 3161 . . . . . 1, 4

18 U.S.C. §3162(a)(2) 5, 8

28 U.S.C. §2111 5

Rule 52(a), Fed. R. Crim. P. 2, 5

Other Authorities:

A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974* (Federal Judicial Center 1980) 7-8

120 Cong. Rec. 41794-95 (1974) 8

No. 95-847

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THOMAS GAMBINO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

Both by what it says and by the crucial argument that it fails to address, the Brief for the United States in Opposition ("Opp. Br.") demonstrates the substantial national importance of this case to the administration of justice in the Federal courts. Review of this case is essential to ensure fair and consistent application of the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.* (the "Act"), throughout the country and to resolve an acknowledged circuit split.

Perhaps no other statute has a greater impact on the day-to-day administration of justice than the Speedy Trial

Act. Not only does it permeate every aspect of the criminal process, but its demands inevitably affect the judicial resources available for civil cases as well. This case presents an unusual opportunity to consider a host of issues that frequently arise in the practical administration of the Act; to resolve a circuit split on one of those issues; and to reaffirm the "cardinal canon" -- which is ignored in both the Government's opposition and the decision below -- "that a legislature . . . means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

While the Government strives mightily to justify the "harmless error" holding below, it offers no response whatever to petitioner's lead argument -- that Congress has *mandated* that an indictment *must* be dismissed when the Speedy Trial Act is violated (Petition for Certiorari ("Pet.") at 14-18). The decision below flies in the face of this Court's unequivocal view in *United States v. Taylor*, 487 U.S. 326, 332 (1988): "the statute *admits no ambiguity* in its requirement that when . . . a violation has been demonstrated, 'the . . . *indictment shall be dismissed* . . . .'" That being so, it is incontrovertible that the failure of the court below to dismiss petitioner's indictment upon finding that the Act was violated "*does* . . . affect substantial rights" of petitioner, Rule 52(a), Fed. R. Crim. P. (emphasis added), and thus cannot be harmless error.

I. THIS APPEAL RAISES SEVERAL ISSUES OF NATIONAL IMPORTANCE UNDER THE SPEEDY TRIAL ACT, INCLUDING A CIRCUIT CONFLICT THAT IS RIPE FOR RESOLUTION.

The Government's primary argument for denying certiorari in this case is that the court of appeals erred in finding a Speedy Trial Act violation. The very arguments that the Government raises, however, show the existence of a circuit conflict and the importance of the issues presented to the administration of justice.

First, the Government admits that a clear circuit conflict is raised by this case. On one side are the decision below and the decision that it followed, *United States v. Clymer*, 25 F.3d 824, 830 (9th Cir. 1994); and on the other are decisions of the Fourth, Fifth, Tenth and Eleventh Circuits.[1] With half of the circuits now having opined, they have firmly divided into two irremediably disagreeing camps on the issue whether this Court's decision in *Henderson v. United States*, 476 U.S. 321, 330 (1986), requires exclusion from the speedy trial calculation of all time -- in many cases, as here, years -- between the filing and determination of a motion whose decision is postponed until at or after trial.

---

[1]*See United States v. Gutierrez*, 48 F.3d 1134, 1136 (10th Cir.), *cert. denied*, 115 S. Ct. 2598 (1995); *United States v. Young*, 45 F.3d 1405, 1411 & n.6 (10th Cir.), *cert. denied*, 115 S. Ct. 2633 (1995); *United States v. Beard*, 41 F.3d 1486, 1489 (11th Cir. 1995); *United States v. Bermea*, 30 F.3d 1539, 1568 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1113 (1995); *United States v. Riley*, 991 F.2d 120, 124 (4th Cir.), *cert. denied*, 114 S. Ct. 392 (1993).

Although the Government concedes the circuit conflict, it objects to review "at the prevailing party's insistence" (Opp. Br. at 10). Reliance upon this general precept, however, is misplaced here for several reasons. First, the Government itself has underlined the issue's importance by making it the first point in its brief. Second, the Government does not dispute that the conflict is ripe for review. Third, the Government's position on this issue, like its position on the harmless error issue, undermines the express language and intent of the Speedy Trial Act, and threatens to consign the Act to oblivion.

Indeed, beyond an out-of-context quote from *Henderson* (Opp. Br. at 9), the Government offers no response to the careful reasoning of the court below and the Ninth Circuit on this issue. In refusing to toll the Act's time limits, both courts applied the express statutory language (which excludes only "the delay *resulting from* any pretrial motion", 18 U.S.C. §3161(h)(1)(F) (emphasis added)), in deciding that a motion which "does not effect a trial court's ability to proceed" to trial (App. 11a), does not "'*result[] from* the pendency of the motion'", *id.*, quoting *Clymer*, 25 F.3d at 830 (emphasis added). Such delay is therefore not excludable.

Second, the Government argues that the court of appeals erred in rejecting application of the "complexity" exception in section 3161(h)(8)(A) (Opp. Br. at 10-11), and claims that "petitioner's own conduct contributed to the delay" (Opp. Br. at 11-12). While the court of appeals carefully considered and rejected the Government's position on both issues (App. 6a-9a and 11a-16a), the questions that the Government raises involve matters of great practical importance in the day-to-day application of the Act by the lower courts.

On both of these issues (as well as on the *Henderson* issue discussed above), this case presents a perfect factual record. It gives this Court the opportunity to provide valuable guidance on application of the "complexity" exception and waiver doctrine under the Act, as well as to resolve the circuit split on application of *Henderson* to indefinitely delayed decisions on pretrial motions.

II. THE "HARMLESS ERROR" DOCTRINE SHOULD NOT BE APPLIED TO EXCUSE GOVERNMENT VIOLATION OF THE SPEEDY TRIAL ACT.

In an effort to preserve the circuit court's unprecedented application of the "harmless error" doctrine to excuse violation of the Speedy Trial Act, the Government cites two statutory sources of the doctrine (Opp. Br. at 12-13). Conspicuously absent from the Government's argument, however, is any mention whatever of the mandatory language of the Speedy Trial Act that flatly compels dismissal of an indictment if -- as here -- "a defendant is not brought to trial within the time limit required" by the Act. 18 U.S.C. §3162(a)(2). As this Court has expressly recognized, "the statute admits no ambiguity" in this regard. *Taylor*, 487 U.S. at 332. The harmless error holding below simply cannot be squared with the language or logic of either *Taylor* or the Speedy Trial Act. Indeed, since this statutory language argument, based on the phrase "*shall* be dismissed", was Petitioner's lead argument (Pet. at 14-18; *see also* Pet. at 21-22), the Government's complete failure to respond directly to it must be taken as a concession of the point.

Both of the harmless error statutes cited by the Government, 28 U.S.C. § 2111 and Rule 52(a), Fed. R. Crim. P. -- neither of which was relied upon by the court

below -- expressly apply only when the "error" or "defect" "does not affect substantial rights". Yet a right could hardly be more "substantial" than the right of a criminal defendant to have an indictment against him dismissed. For this reason, the Government is wrong in arguing that "petitioner would have been in no better position had the superseding indictment been dismissed without prejudice" (Opp. Br. at 15). This Court's decision in *Taylor* explicitly recognized the value to a defendant of dismissal without prejudice. *Taylor*, 487 U.S. at 342.

Among other things, petitioner would have been "immunize[d] from prosecution" (Opp. Br. at 14) on this indictment.[2] Petitioner would have been free -- as Congress intended -- of the stigma of a pending prosecution for some period of time. *See United States v. Marion*, 404 U.S. 307, 320 (1971); *United States v. Rojas-Contreras*, 474 U.S. 231, 238 (1985) (Blackmun, J., concurring). Indeed, unless the Government is asserting the cynical view that it totally controls the grand jury's actions, there is some possibility that reindictment would not have occurred at all. *See Taylor*, 487 U.S. at 342.[3]

---

[2]The fact that Congress has expressly directed that a Speedy Trial Act violation must be remedied by dismissal of an indictment distinguishes this case from decisions such as *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) and *United States v. Mechanik*, 475 U.S. 66 (1986), holding that harmless error analysis applies to certain errors in the grand jury process. *See* Opp. Br. at 13-14.

[3]In this case, the delay that would have resulted from the need to reindict petitioner could also have affected the trial

(continued...)

Nor does the Government dispute petitioner's contention that engrafting a "harmless error" exception onto the Speedy Trial Act's dismissal remedy will render the Act a practical nullity. *See* Pet. at 16-18. As this Court recognized in *Taylor*, the remedy of dismissal without prejudice was a last-minute compromise that was the key to obtaining passage of the Act. *Taylor*, 487 U.S. at 334-35 & n.8. If dismissal without prejudice becomes a "toothless sanction" (*id.* at 342) -- as it surely would if the likelihood of reindictment justifies an affirmance on "harmless error" grounds -- it would effectively rewrite a statute that was supported by its sponsors only because it contained meaningful sanctions against delay. *Id.* at 334.[4]

---

[3](...continued)
itself. *Cf. United States v. Taylor*, 487 U.S. 326, 342 (1988) (dismissal without prejudice "is not a toothless sanction" because, *inter alia*, of "effect of delay on the Government's ability to meet" "the burdens borne by the prosecution"). The court of appeals held that certain exculpatory material that petitioner first learned of shortly after his trial was "quintessential *Brady* material" (App. 26a). This included a tape recording of a key Government witness telling a potential grand jury witness: "Ten percent of the time, you out and out lie." Although the court of appeals found that suppression of the *Brady* material would not have warranted a new trial (App. 27a), the availability of this evidence at trial on a new indictment would surely have led to a different presentation by the defense.

[4]*See, e.g.*, A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 31-32 (Federal Judicial Center 1980) (cited in *Taylor*, 487 U.S. at 334): "Proponents
(continued...)

In the face of the plain language of the Speedy Trial Act ("shall be dismissed", 18 U.S.C. §3162(a)(2)) and this Court's specific pronouncement that such language "admits no ambiguity in its requirement" of dismissal, *Taylor*, 487 U.S. at 332, the Government's strained effort to justify harmless error review must be rejected. The Government's position does not harmonize the Speedy Trial Act and the harmless error statutes. Rather, it renders the Speedy Trial Act virtually meaningless in the real world.

---

[4](...continued)
of the legislation regarded the threat of dismissal as the critical element that made the time limits more than merely precatory"; *Id.* at 219, quoting 120 Cong. Rec. 41794-95 (1974) (remarks of Mr. Cohen):

> "Notwithstanding the position [favoring mandatory dismissal] of the American Bar Association, the judges I have mentioned, and even Justice [then Assistant Attorney General] Rehnquist's statement on this matter, in the interest of seeing that this measure be passed, approved, and signed into law, I offer an amendment which would allow the court in its discretion to dismiss a case with or without prejudice."

CONCLUSION

For the foregoing reasons, and for those stated in the Petition, this Court should grant certiorari and review the decision below.

April 19, 1996

Respectfully submitted,

DAVID A. BARRETT
Counsel of Record
DUKER & BARRETT, L.L.P.
1585 Broadway
New York, New York 10036
(212) 969-5600

MICHAEL ROSEN
17 Battery Place
New York, New York 10007

JUDD BURSTEIN
99 Park Avenue
New York, New York 10016

GERALD L. SHARGEL
1585 Broadway
New York, New York 10036

GRAHAM HUGHES
40 Washington Square South
New York, New York 10012

Of Counsel